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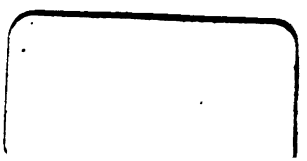

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WASHINGTON REPORTS

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OF

WASHINGTON

SEPTEMBER 25, 1909 — NOVEMBER 16, 1909

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ERRATA

Page 88, line 19 from top, for ch. 59 read ch. 159
Page 242, 3d syllabus, 3d line, for previous read precious

CASES

DETERMINED IN THE

SUPREME COURT

OF

WASHINGTON

[No. 7512. *En Banc.* July 26, 1909.[1]]

THE STATE OF WASHINGTON, *on the Relation of Nicomen Boom Company, Appellant,* v. NORTH SHORE BOOM AND DRIVING COMPANY *et al., Respondents.*[2]

APPEAL—DECISIONS REVIEWABLE—DISMISSAL OF CONTEMPT PROCEEDINGS. No appeal lies from an order purging a party of contempt in so far as an attempt is made to impose a fine and imprisonment on a charge of contumacy affecting the dignity and processes of the court only.

SAME—CIVIL CONTEMPT—DAMAGES. Under Bal. Code, § 5811, providing for an appeal in contempt proceedings "in like manner and like effect as from judgment in an action," appeal lies from the dismissal of a contempt proceeding seeking an award of damages resulting to private interests from the violation of a judgment of the court.

JUDGMENTS—VALIDITY—COLLATERAL ATTACK. A judgment entered by the lower court after remand of the case on appeal, upon determination of the prior right to booming privileges, cannot be collaterally attacked or disregarded because of error in fixing the boundaries of the boom grounds; since that question was within the jurisdiction of the court to decide.

CONTEMPTS—VIOLATION OF JUDGMENT—CIVIL REMEDIES—DAMAGES FOR LOSS. Under Bal. Code, § 5807, providing that in contempt proceedings the court may give judgment to indemnify an aggrieved party, in addition to the punishment imposed, the court should award damages in a proceeding for contempt for the violation of a judgment.

[1]NOTE: This case withheld from publication pending rehearing. REP.

[2]Reported in 103 Pac. 426.

SAME—APPEAL—SUPERSEDEAS. A party is guilty of a technical contempt in violating a judgment pending an appeal which was either abandoned or dismissed for want of jurisdiction, and is liable to the aggrieved party to the extent of the loss sustained, notwithstanding the appeal was prosecuted in good faith under an order and bond superseding the judgment pending the appeal.

APPEAL—SUPERSEDEAS. Where an appeal or writ of review from the state court to the Federal court is either abandoned or dismissed for want of jurisdiction, it is not superseded by an order allowing a supersedeas and a bond given therefor.

STATUTES—CONSTRUCTION—MAY AND SHALL—CONTEMPT. A statute providing that the court "may" award damages for a civil contempt in addition to punishment, being remedial in its nature, will be construed to mean "shall," where the aggrieved party asks for and is willing to take the same in such proceeding in lieu of an ordinary action.

CONTEMPT—CIVIL OR CRIMINAL—INDEMNITY. Where contempt in the violation of a court order is not willful or defiant, but an exercise of a supposed right, done in good faith by advice of counsel, the party will not be punished as for a direct or criminal contempt, but as for a civil contempt, and he may, pursuant to statute, be required to indemnify the other party.

CONTEMPT—CIVIL CONTEMPT—AGAINST WHOM AWARDED—ATTORNEY FOR PARTY. The power to award indemnity for a civil contempt resting entirely upon statute, Bal. Code, § 5807, authorizing the court to give judgment that the party aggrieved recover of the defendant a sum sufficient to indemnify him, does not authorize a judgment against the attorney for a defendant corporation who was a stockholder and advised the act which resulted in a contempt by the corporation and its officers, where the attorney acted in good faith (MOUNT and DUNBAR, JJ., dissenting).

SAME—CIVIL AND CRIMINAL CONTEMPT. A civil judgment for contempt for violating an order of the court may be granted, although no criminal contempt was committed.

Appeal from a judgment of the superior court for Pacific county, Rice, J., entered January 23, 1908, upon findings in favor of the defendants, in contempt proceedings, after a trial on the merits before the court without a jury. Reversed.

W. W. Cotton, Welsh & Welsh, and *James G. Wilson*, for appellant.

Chas. E. Miller and *W. H. Abel*, for respondents.

CHADWICK, J.—This proceeding was instituted by relator, the Nicomen Boom Company, in whom the right of booming logs in the North river in Pacific county, Washington, has been adjudged by this court to be. The parties are not strangers to this court; consequently a rehearsal of the differences arising between them in their efforts to have determined the prior rights of boomage under the state law in North river is not now necessary. Reference to the cases of *Nicomen Boom Co. v. North Shore Boom etc. Co.*, 40 Wash. 315, 82 Pac. 412; *North Shore Boom etc. Co. v. Nicomen Boom Co.*, 52 Wash. 564, 101 Pac. 48, and *State ex rel. North Shore Boom etc. Co. v. Nicomen Boom Co.*, 53 Wash. 499, 102 Pac. 394, will be sufficient.

From the judgment of this court, entered on the 6th day of December, 1905, the respondent, North Shore Boom & Driving Company, prosecuted an appeal to the supreme court of the United States. To secure its rights pending the appeal, it obtained an order fixing a supersedeas in the sum of $10,000. This order was made on the 17th day of January, 1906. The North Shore Boom Company has operated its booms in defiance of the rights of the relator. On the 13th day of March, 1907, the North Shore Boom Company, conceiving that its appeal might not be effectual in that it might be determined that an appeal would not lie from the judgment of this court, or if the supreme court of the United States should hold that its attempted removal of the case to the Federal court was in fact a proceeding by writ of review in that it asked for a review of the judgment of the superior court rather than of this court, sued out a writ of review, upon which a supersedeas was fixed in the sum of $20,000. Thereafter, the first appeal or writ (whichever it may be called is not now material) was dismissed in the supreme court of the United States upon motion of the respondent, the North Shore Boom Company. The last proceeding went to final hearing, and was determined on the 23d day of February, 1909. The court refused to consider the merits of the

controversy, and dismissed the writ for the want of jurisdiction, holding that no Federal question was involved. *North Shore Boom & Driving Co. v. Nicomen Boom Co.*, 212 U. S. 406, 29 Sup. Ct. 355, 53 L. Ed. 574.

Pending these attempts to review the judgment of the state courts, respondent proceeded with its booming operations in the North river. Acting upon the assumption that the first attempt to appeal was ineffectual for any purpose and that the second attempted review was insufficient to confer jurisdiction on the Federal courts or to warrant a supersedeas, relator instituted this proceeding, setting up the facts in detail as we have briefly outlined them, and praying for an order adjudging respondent guilty of contempt; that its officers and stockholders be fined in the sum of $300 each, and imprisoned for a period of six months, and that it recover the sum of $27,000, alleged to be the damages sustained by reason of the unwarranted interruption of its booming privileges. Respondents, upon rule to show cause, set up the two supersedeas orders and the proceedings in the Federal court in justification of its conduct. After trial, the court found that the respondent had not been guilty of contempt, the real basis for this finding being that respondent, The North Shore Boom Company, was operating under a supersedeas issued by this court.

Respondents have moved to dismiss the appeal, upon the ground that no appeal lies from an order purging a respondent in contempt proceedings. This rule would no doubt prevail in all cases where a party was cited to answer to a charge of contumacy affecting the dignity and ordinary processes of the court, and will be now followed by us in so far as the attempt to impose a fine and imprisonment on respondents is concerned. But the law of this state goes further than the rules of the common law governing contempts, and in cases of this kind permits the award of damages resulting to the private interest affected by the order of the court which has been disregarded and set at naught. It is a *quasi* civil action

and, when so regarded, either party aggrieved has the right of appeal. It is even expressly provided in the chapter on contempts and their punishments, Bal. Code, § 5811 (P. C. § 1480), that an appeal will lie "in like manner and with like effect as from judgment in an action." The distinction as well as the rule governing this class of cases is well stated in the case of *Morgan's Sons Co. v. Gibson*, 122 Fed. 420, 423:

"It is a well-known fact, to which allusion has twice been made in decisions of this court (*In re Reese*, 47 C. C. A. 87, 90, 107 Fed. 942, 945; *In re Nevitt*, 54 C. C. A. 622, 117 Fed. 488, 458), that contempts of court are of two kinds—those that are prosecuted to punish persons for showing disrespect to the courts, either by offensive conduct in their presence or by setting their authority at defiance, in the prosecution of which the entire public is immediately interested because the welfare of the courts is concerned; and those contempt proceedings that are inaugurated at the instance of some private litigant or litigants to compel obedience to an order or decree made in the case for the protection of their individual rights. In the latter class of cases the public at large is not directly interested. The proceeding does not partake of the character of a public prosecution at the instance of the state, as for a crime committed in setting the authority of its courts at defiance, but the proceeding is rather of a civil or remedial nature, for the benefit of a particular individual or individuals whose rights cannot be otherwise preserved. The distinction between the two kinds of contempt has been recognized in other cases. *People etc. v. Diedrich*, 141 Ill. 669, 670, 30 N. E. 1038, and cases cited. The case in hand is obviously a contempt proceeding of a civil and remedial nature as distinguished from one of a public or criminal character. The public had no special concern in the question whether the appellee had used words on his labels which violated the injunction, but the appellant was deeply interested in that question, since, if the charge was true, it affected a property right which he had succeeded in establishing. Moreover, if that right was being invaded by the appellee, notwithstanding the decree, the court which entered the decree could with no greater propriety refuse relief when the fact was called to its attention by the appellant, than it could withhold an execution to collect a judgment which it

had rendered. We are of opinion, therefore, that the final action of a court in such a case as the one at bar, whether it be an order discharging the rule to show cause or one imposing a fine tantamount to the injury that has been sustained by the complaining party, is subject to review, and that in equity cases like the one at hand, where the object is to enforce the provisions of a final decree and compel obedience thereto, the remedy is by such an appeal as was taken."

See, also *Vilter Mfg. Co. v. Humphrey*, 132 Wis. 587, 112 N. W. 1095, 13 L. R. A. (N. S.) 591; *State ex rel. Denham v. Superior Court*, 28 Wash. 590, 68 Pac. 1051.

The decision of the supreme court of the United States in the principal case has, with one exception which we shall hereafter notice, disposed of the other grounds relied on to dismiss the appeal. The motion is denied.

One of the grounds urged on the motion to dismiss really goes to the merits of the case and will be so treated. It is stated by counsel as follows:

"The judgment for the disobedience of which the contempt proceedings were instituted is a void judgment, and was entered by the court below in excess of its jurisdiction, and the respondents were not bound to obey it."

We do not think this position tenable. Although the judgment entered by the lower court, upon remand of the case decided in 40 Wash. 315, 82 Pac. 412 (*Nicomen Boom Co. v. North Shore Boom etc. Co.*), went, in the opinion of respondents, further than the law and facts warranted (it has since been held otherwise), and included boundaries beyond the true limit of relator's property, the judgment would not be for that reason void. Jurisdiction is to be determined by reference to the subject-matter of a proposed or pending action. In the principal case the subject-matter was not to determine the boundaries between the areas claimed by the parties, but to find out which of them was entitled to booming privileges in North river under the state law. The statute (Laws 1890, p. 470 *et seq.*) provides that a company may be organized, and having complied with certain statutory requirements,

shall have the first right of booming logs in the stream over which it seeks to assert its jurisdiction. The legislature has seen fit to give to these companies a *quasi* public character. Boom companies are in effect common carriers, and to encourage them as a necessary adjunct to a leading industry upon which the welfare and prosperity of a large part of our population depends, has declared that the first in time shall be first in right. So long, then, as this question is before the court, it is within its jurisdiction, and its judgment cannot be collaterally questioned or disregarded because the court may have made an error in fixing the boundaries of the boom grounds.

Much of the briefs and time in oral argument was taken up with a discussion of the nature of the first proceeding to remove the principal case from the state to the Federal court. On the one hand it is contended that it was an attempt to appeal where no appeal is contemplated or permitted in law or by the practice in the Federal courts, and for that reason absolutely void; while, on the other hand, it is insisted that the admitted writ of review which was subsequently sued out was sued out solely in the interest of prudence and caution, to avoid the question occurring as to the finality of the judgment of this court; that the first writ or appeal was dismissed voluntarily; that no motion was directed to it by relator; that the effect of the proceedings and the relations of the parties were in no way changed; and that the latter writ, being of admitted worth, it had a right under its supersedeas bond to operate its boom, and thus, acting in good faith, it and its officers and attorneys are not guilty of contempt.

It will thus be seen that, with the disposition of these preliminary questions, the only question for us to decide is whether respondent, having prosecuted its cause in good faith in the Federal courts, in a case which, according to the judgment of the supreme court of the United States involved no Federal question, and was therefore dismissed for want of jurisdiction by that court, will subject relator to the penal-

ties of the chapter of our civil code devoted to contempts and their punishments. We have already said that, were the state the party complaining, the holding of the trial court that there was no malice or wilful intent to interfere with the orderly execution of the process of that court would not be disturbed; but considering our statute in the light in which we have already discussed it, an altogether different question is presented. That the relator has been deprived of a valuable property right ever since the rendition of judgment in the principal case cannot be denied. It has suffered a wrong and is entitled to its remedy. In the absence of the statute, it would of course be relegated to an action for damages or an action upon the supersedeas bonds. But it would seem that the statute (Bal. Code, § 5807; P. C. § 1476), by its very terms gives the relator its choice of remedies.

"If any loss or injury to a party in an action, suit, or proceeding, prejudicial to his rights therein, have been caused by the contempt, the court or judicial officer, in addition to the punishment imposed for the contempt, may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him, and to satisfy his costs and disbursements, which judgment, and the acceptance of the amount thereof, is a bar to any action, suit, or proceeding by the aggrieved party for such loss or injury."

If, therefore, in lieu of the ordinary action, relator desires to and is willing to take its damages in this proceeding, respondent can have no ground for complaint. It is liable in any event. Its appeal and writs were ineffectual and have been either abandoned or dismissed for want of jurisdiction. In such cases there can be no room for the contention that the judgment was superseded. *Jabine v. Oates*, 115 Fed. 861; *Verden v. Coleman*, 22 How. 192, 16 L. Ed. 336; *Saltmarsh v. Tuthill*, 12 How. 387, 13 L. Ed. 1034; *Sage v. Central R. Co.*, 93 U. S. 412, 23 L. Ed. 933.

The only question that might occur in this connection is the meaning of the word "may," as used in § 5807, which we have quoted. The authorities in which this word has been

construed are so numerous that time and space would be consumed unnecessarily by a recapitulation of them. Primarily, the word should be taken in its ordinary meaning, and be regarded as permissive only. But, after all, its meaning is to be determined in each case from the apparent intent of the statute in which it is employed; so that, in all remedial statutes or whenever the rights of the public or of third persons depend on the exercise of the power of a court or public officer, or the performance of a duty, and a claim *de jure* that the power may be exercised exists, it should be construed to mean "shall." The authorities upon this subject are collected in Words and Phrases, vol. 5, pp. 4420-4447. Reference may, however, be made to a few that seem to us to bear directly upon the instant case.

In *Rock Island County Supervisors v. United States*, 71 U. S. 435, 18 L. Ed. 419, the supreme court of the United States said:

"The conclusion to be deduced from the authorities is that where power is given to public officers, in the language of the act before us, or in equivalent language—whenever the public interest or individual rights call for its exercise—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depositary to meet the demands of right, and to prevent a failure of justice. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose 'a positive and absolute duty.'"

See, also, *Mason v. Fearson*, 50 U. S. 248, 13 L. Ed. 125; *People ex rel. Conway v. Supervisors*, 68 N. Y. 114.

In *Brainerd v. De Graef*, 29 Misc. Rep. 560, 61 N. Y. Supp. 953, it was held that a statute providing that the court "may" award costs against administrators for unreasonably resisting or neglecting the payment of claims against the estate, was mandatory. It has been frequently held that

statutes providing that under certain contingencies a court "may" adjudge costs in the event of recovery are imperative. *Carter v. Barnum*, 24 Misc. Rep. 220, 53 N. Y. Supp. 539; *Crake v. Powell*, 10 Ency. Law & Eq. 329; *Macdougall v. Paterson*, 11 C. B. 755; *Grantham v. Thrall*, 31 How. Prac. 464; *Lansing v. Easton*, 7 Paige (Ch.) 364.

A similar statute in Wisconsin employs the word "shall" instead of "may." In a case—*Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518—the court drew a distinction between criminal and civil contempts, holding that the latter possessed all the characteristics and incidents of a civil action. In *Lorick v. Motley*, 69 S. C. 567, 48 S. E. 614, the court said:

"All contempt proceedings grow out of the duty of the individual to obey the orders of the court and the court's duty to maintain its dignity and authority; but the maintenance of the court's dignity and authority is not itself the ultimate purpose to be attained. This is rather a means to the practical end, that litigants who submit their personal and property rights to a tribunal established by law may have their rights as adjudicated by that tribunal protected and enforced by its power. When the contempt does not directly affect any particular individual, the penalty is inflicted for the benefit of the state at large. When, on the other hand, property of an individual is taken or destroyed in contempt of the court's order, those interested have a right to ask of the court its restoration or payment of its value at the hands of the offender, and the court requires such restoration or payment of its value as part of the punishment. In each instance the ultimate purpose is the protection of adjudicated right."

The statutes of Utah are in form as is our own. It was held in *Davidson v. Munsey*, 29 Utah 181, 80 Pac. 743, that the court had power to enter a judgment for ascertained damages as indemnity for the actual loss or injury caused by the misconduct of the other party. So in *Snow v. Snow*, 13 Utah 15, 43 Pac. 620, the distinction between criminal and civil contempts is pointed out, the latter being given the character of a civil action.

In the case at bar the statute is manifestly remedial, and intended to promote justice without unnecessary delay and without resort to vexatious litigation. The damages to which respondents must respond in some action being possible of exact determination from the evidence, it was the duty of the court to act upon the demand of the relator, enter a finding of contempt under § 5807, *supra*, and assess the damages. The trial court made the following finding:

"That said Nicomen Boom Company would have made a profit of forty cents per thousand feet, board measure, on all of the said logs which were caught, boomed and rafted by the said North Shore Boom and Driving Company as heretofore found, if said Nicomen Boom Company had caught, boomed and rafted said logs, to wit: said 42,165,453 feet, board measure."

The evidence is conflicting as to the amount of profit which would have been made by relator had its work been uninterrupted, and we therefore adopt the findings of the trial judge. Although respondents proceeded in perfect good faith and are not therefore guilty of any act criminal in its nature warranting fine or imprisonment, they are technically guilty of contempt under the statute, which is intended for the advantage and benefit of the opposite party, and are answerable to the extent of the loss sustained.

The case will be reversed, and remanded with instructions to enter judgment in accord with this opinion.

RUDKIN, C. J., MOUNT, DUNBAR, CROW, and GOSE, JJ., concur.

FULLERTON, J., dissents.

PARKER and MORRIS, JJ., took no part.

ON REHEARING EN BANC.

[Decided February 19, 1910.]

CHADWICK, J.—In the main case, decided July 26, 1909, we held the defendant boom company, J. W. Kleeb, John F.

Hobi and W. H. Abel for the civil damages resulting to the appellant from the continued use of appellant's boom ground, pending ineffectual attempts to carry the original controversy between the Nicomen Boom Company and the North Shore Boom & Driving Company to the supreme court of the United States. Mr. Abel is a stockholder in the North Shore Company. He was not an officer, but with other attorneys advised respondent company that it had a right to the use and occupation of the boom grounds in dispute pending the decision of the supreme court of the United States. The lower court found, and a careful review of the evidence has convinced us, that the advice of counsel was given in good faith and in no way intended as an affront to the dignity of this or the trial court, or in contemptuous disregard of our orders, but under the mistaken idea that the judgment had been lawfully superseded. This we held was not so. Judgment being asked under the civil damage statute (Bal. Code, § 5807), and the amount thereof being subject to exact calculation, upon the findings of the trial judge, we ordered judgment entered accordingly.

The point was not made on the argument of the main case, but upon rehearing we are asked to modify our decision and direct that no judgment be entered against Mr. Abel. The point is made by appellant that, but for the advice of Mr. Abel, the judgment in this court would not have been disregarded; that he is more guilty than they, both Kleeb and Hobi, because of his knowledge and understanding of the law, and that he should therefore be held to respond to a fine equalling the amount of damages suffered. The question of Mr. Abel's wilful contumacy is foreclosed by our former opinion. Had we found him to be chargeable with contumacious conduct, we would have so declared and subjected him to a fine therefor. But the question now before us, broadly stated, is whether an attorney, who, in good faith and with some foundation for his opinion, so advised his client

that the client disregarded an order of the court, should be held jointly with the client to pay to the party aggrieved civil damages which the court has the power to assess as compensation under the statute. The power to punish for contempt inheres in all courts of record, and can be exercised independently of the statute. But the power to award an indemnity in the way of a fine to the injured party rests wholly upon the statute, and in the exercise of its power the court cannot go beyond its terms. 9 Cyc. 54. Where indemnification to the party is allowed, the rule is that, where the alleged contempt is not wilful or defiant, but the act was an exercise of a supposed right done under the advice of counsel given in good faith, the act will not be punished as a direct, constructive, or criminal contempt, but as a civil contempt; that is, the offending party will be required to make the other party whole for the damages sustained thereby. *French v. Commercial Nat. Bank*, 79 Ill. App. 110; *Matthews v. Spangenberg*, 15 Fed. 813; *Smith v. Cook*, 39 Ga. 191; *Hawley v. Bennett*, 4 Paige 163. The remedy of the statute, as was said in our first opinion, is in lieu of the ordinary action for damages.

Referring now to the language of the statute: "If any loss or injury to a party in an action, suit or proceeding, prejudicial to his rights therein, have been caused by the contempt, the court . . . may give judgment that the party aggrieved recover of the defendant a sum of money sufficient to indemnify him," etc., this statute requires construction only as to the meaning of the words "contempt" and "defendant," as employed therein. Manifestly the contempt is the act of the other party to the controversy, the party litigant, or, if a corporation, such of its servants and officers as are named in or bound by the injunctive order. There is nothing in the statute to indicate that it was intended to include one who in good faith advises the wrong. It is unquestionably the rule that an attorney will not be

held either for a direct or constructive contempt, unless it is made to appear that he wilfully offended against the dignity of the court. An offending attorney would be liable to the state for a wilful disregard of the orders of the court, but it would require a forced construction of the statute to make him subject to civil liability because of his advice honestly given. Regardless of the statute now under consideration, the undoubted rule is that, if an attorney acts an honest part and is actuated by no improper motives, he cannot be held liable for a tort because of his mistaken advice and its consequences. *Roth v. Shupp*, 94 Md. 55, 50 Atl. 430; *Farmer v. Crosby*, 43 Minn. 459, 45 N. W. 866; Cooley, Torts (3d ed.), 221.

In High on Injunctions (4th ed.), § 1440b, it is said:

"But it is to be observed that where it is sought to hold one who is not a party to the suit or named in the writ liable for disregarding an injunction, the punishment is imposed not upon the theory that the person thus charged is in any way bound by the injunction itself or that he is guilty of a technical violation of the writ, but solely for the purpose of protecting and upholding the power and dignity of the court as against one who, although not bound by the injunction as a party to the suit, has knowingly and wilfully defied the authority of the court in setting its order at naught. In such case the proceeding is criminal in its nature and is without regard to any injury which may be inflicted upon the defendant as the result of the violation of the writ, and it is to be distinguished from a contempt proceeding against a party to a suit for a violation of the injunction, which is remedial in its character and is ordinarily brought for the purpose of affording redress and compensation to the plaintiff for the injury resulting from the violation of the writ. Where, therefore, a contempt proceeding is brought against a person upon the theory that he is technically bound by the injunction as a party to the suit, it is improper to impose punishment for a violation of the injunction, where it appears that he was not a party to the injunction action, either by name or representation, or in any way bound by the decree."

It has been most strenuously urged, not only in the petition for rehearing but also on oral argument, that a civil judgment could not in any event be entered, unless the parties bound thereby had been found guilty of a criminal contempt, actual or constructive. A consideration of this question is not now material in the strict sense, but is to some extent apropos of our present discussion, in that it will serve to illustrate the difference between a *quasi* criminal contempt and a civil contempt, and will therefore be incidentally noticed. It is said that it would be anomalous, if not ridiculous, to hold that a party was not guilty of contempt, and at the same time enter a judgment for the loss sustained. It might have been better, and the objects of the law more readily understandable, if the remedy afforded by Bal. Code, § 5807, had not been made a part of that chapter which puts in statutory form the common law powers of the court. But a casual reference to the books will reveal the spirit and the purpose of the act. It makes a judgment for criminal contempt not only unnecessary but possibly unwarranted, unless there has been a wilful disobedience of the court's order. The party may be guilty of both a criminal contempt and a civil contempt, or he may be guilty of the one and not the other. A fine payable to the state may be imposed and a civil judgment of indemnity to the party may be rendered, not because they are interdependent, but because the dignity of the court has been affronted and at the same time a loss imposed on the other party. If either element is lacking, the court may render judgment accordingly. The state of Wisconsin, under a statute the same as our own except that it says if the injury be caused "by the misconduct" of the party instead of "by the contempt," as used in our statute, has held:

"The distinction between a proceeding which results in criminal punishment under ch. 119, or sec. 20 of ch. 149, and one which results in awarding indemnity to the injured party, is manifest and substantial. One is criminal in its character,

the other civil; one is prosecuted by the state outside the particular cause in which the offense was committed (if committed in the progress of a cause), the other is a proceeding in the cause in which the offense was committed, or ancillary to it; one results in punishment by fine, or imprisonment, or both, inflicted to vindicate the authority and dignity of the court, which the defendant has contemned; the other in adjudging the offender to pay a sum sufficient to indemnify the injured party for the loss he has sustained by the misconduct of the offender, and to satisfy his costs and expenses. In the one case, the fine goes to the school fund, in the other the indemnity goes to the injured party; . . .." *In re Pierce*, 44 Wis. 411.

See, also, *Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518; *People v. Compton*, 1 Duer 512 (8 N. Y. Sup'r Ct.).

It follows that a criminal contempt, actual or constructive, or, as Blackstone says, direct or circumstantial, partakes of the quality of an offense against the state; whereas a civil contempt under the statute is such disobedience of an order of a court of competent jurisdiction entered for the benefit or advantage of a party to a civil action as works a loss or injury to the litigant. The one is *quasi* criminal, the other is civil wrong; the one is absolved by fine payable to the state or imprisonment, the other by reparation to the other party litigant.

These considerations convince us that Mr. Abel cannot be held personally liable in this case. Aside from the general rule as to the liability of attorneys to third persons, it seems to us that to so hold would stifle the free expression of honest opinion upon any question where the law is unsettled and the issue in doubt. If the Nicomen Boom Company could not hold Mr. Abel in a direct proceeding—and we have shown that it could not—he cannot be held under the statute unless he comes within its terms. The injured party cannot make the attorney of his adversary a surety or sponsor for his debt because of his error of judgment. Our former opinion will be so modified as to exempt Mr. Abel from the liability

there imposed. With this difference it will be reaffirmed. Upon remand, judgment will enter accordingly.

RUDKIN, C. J., GOSE, MORRIS, PARKER, and CROW, JJ., concur.

MOUNT, J. (dissenting)—I dissent. The majority opinion is probably correct upon the questions discussed, but Mr. Abel was more than a mere attorney in the case. He was one of three stockholders in the corporation which did the damage. He did not hold the office of director, but he was the attorney for the corporation from the time it was incorporated. He was an active, interested party, and advised the officers to do the things complained of, if he did not directly participate therein himself. The findings in the contempt proceeding recite:

"That since the entry of the judgment in the superior court of the state of Washington for Pacific county, the defendants North River Boom & Driving Company, John W. Kleeb, John F. Hobi, its officers, and W. H. Abel as its attorney, have constantly maintained and operated said boom and other structures of the North Shore Boom & Driving Company upon the location of the Nicomen Boom Company in said North river. . . . and each of them have constantly since said date . . . boomed logs coming down said North river and thereby interfered with the boom and booming structures of the said Nicomen Boom Company in said North river . . . and that defendants and each of them have constantly interfered with the relator's boom," etc.

Under this finding and other conceded facts, it cannot be said that Mr. Abel merely as attorney in this particular case advised the officers of the corporation in good faith. Nor can it be said that he was a mere passive stockholder. He was clearly an active, interested party, advising and directing the officers of the corporation in his interest at all times. Under these facts it seems that he should be held liable in civil damages equally with those whom he directed and assisted by his advice. The mere fact that he was an attorney

in the case ought not to release him. If so, it is unfortunate for the other two stockholders that they were not also attorneys for their own company in this particular case.

DUNBAR, J., concurs with MOUNT, J.

[No. 7870. Department One. September 25, 1909.]

PEACOCK MILL COMPANY, *Appellant*, v. W. J. HONEYCUTT *et al.*, *Respondents*.[1]

FRAUDS, STATUTE OF—ORAL SALE OF PERSONALTY. A parol sale of wheat f. o. b. cars, under a general custom in the locality that the title did not pass until delivery on board the cars, is within the statute of frauds.

TAXATION—LISTING—MISTAKE—EVIDENCE. The evidence of a mistake of fact in listing property for taxation must be clear, cogent, and convincing in order to overcome the presumption arising from the sworn detail sheet.

SAME — MISTAKE OF LAW — RELIEF—RESTRAINING COLLECTION OF TAX. Where wheat was orally purchased in February, but the title did not pass until it was delivered on March 7th, and the purchaser's manager, without looking up the dates but knowing that the wheat was delivered after that date, listed the same for taxation as of March 1st, after the assessor informed him that the vendor refused to pay, his error was a mistake of law, and not of fact, which a court of equity cannot relieve, by restraining collection of the tax, in the absence of fraud or misrepresentation.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered October 26, 1908, in favor of the defendants, dismissing an action to restrain the collection of taxes, after a trial on the merits before the court. Affirmed.

E. L. Rinehart, for appellant.

Otto B. Rupp and *Herbert C. Bryson*, for respondents.

[1]Reported in 103 Pac. 1112.

Gose, J.—This action, instituted by the appellant to restrain the collection of certain taxes, terminated in a judgment of dismissal as to all the respondents except Reser. This appeal has been taken from such judgment.

The evidence shows that, in the latter part of February, 1907, the appellant offered the respondent Reser a definite price per bushel for 13,500 sacks of wheat delivered f. o. b. cars at Walla Walla, then in store in the warehouse in that city; that about February 28, 1907, the offer was accepted; that at that time there was no payment made upon the purchase price, and the entire contract rested in parol; that the first delivery was made on March 7, and the delivery was completed some time in April following. The evidence further shows that the words "delivered f. o. b. cars" at Walla Walla means in that community that the grain is to be delivered by the vendor on board the cars before any title passes. This is shown to be the general custom in that locality. Indeed, it would seem that the term itself could have no other meaning. The contract when made was within the statute of frauds and not enforcible. Pierce's Code, § 5344 (Bal. Code, § 4577). The title remained in the vendor until there was a delivery.

On the 23d day of April, 1907, the wheat was listed and assessed as the property of the appellant. The detail sheet recites that it is a "schedule of the number and amounts of all personal property in the possession or under the control of W. W. Raymond, belonging to the Peacock Mill Company on the 1st day of March, 1907, listed by W. W. Raymond." On the date of the assessment, the schedule was signed "Peacock Mill Company by W. W. Raymond," and sworn to by the latter on that date. The complaint charged that the wheat was listed by Raymond, the appellant's then president, through a mistake of fact, and upon the representations of the county assessor that the appellant owned the wheat on March 1.

The evidence of mistake must be clear, cogent, and con-

vincing in order to overcome the presumptions arising from the sworn detail sheet. *Denny v. Holden, post* p. 22, 103 Pac. 1109. Measured by this rule, the appellant has not shown a mistake of fact existing at the date of the assessment. Mr. Raymond, the appellant's president, testified that he first told the assessor that he did not believe the appellant should pay the tax; that he suggested that the former should see the respondent Reser about it, and that he replied, "Very well, I will come back later and see what I can do about it"; that in about two weeks the assessor again came to him, and that he said to the assessor, "How did you make it about the wheat?" and that the latter replied, "Reser says he had sold the wheat and he wouldn't pay the taxes on it;" that he then said to the assessor, "I suppose that I will have to pay. I studied about it a while and then I signed that schedule." He further testified: "When he [meaning the assessor] first came into the office I had my mind made up not to sign it, and when he came back and said that Mr. Reser had said that he had sold the wheat and he wouldn't pay for it . . . I thought if he would not, we might just as well pay for it . . . I did not look up the dates." Again, he said: "All he told me was that Mr. Reser would not pay the taxes on the wheat." The witness made no direct statement that he signed the schedule believing at the time that there had been a delivery of the wheat before March 1. Indeed, the inference to be drawn from his testimony is that he knew when he signed the schedule that the wheat was delivered after that time. The assessor testified that Raymond "said that it was not delivered until after the 1st of March. He said that he had not loaded any. He said he purchased it some few days prior to the 1st of March. Had bought it f. o. b. and did not consider it his wheat until it was loaded, or something like that. I would not be positive as to the conversation." Speaking further as to the understanding between Raymond and himself, he said, "No, we had no question as to the time he purchased it, but as to the time it was delivered." It seems

clear from the evidence that the appellant did not list the wheat under a mistake of fact, or upon any representation made by the assessor that it owned the wheat on the 1st day of March.

If the schedule was signed under a mistake at all, it was as to when the title to the wheat vested in the appellant. This would be a mistake as to the law applicable to the facts. The general rule is that equity will not relieve against a mistake of law. This rule has its exceptions, but we are not aware of any exception to the general rule which would afford relief in the instant case. Fraud and misrepresentation are conspicuously absent. In discussing the rule and its exceptions in *McKay v. Smith*, 27 Wash. 442, 67 Pac. 928, we said:

"But it is said the mistake made was a mistake of law, and that equity will not relieve against a mistake of law. This is undoubtedly the general rule; but this rule, like many other general rules, has its exceptions, as well defined as the rule itself. It is held that equity will relieve against a mistake of law where the adverse party is seeking to gain, without consideration, an unconscionable advantage through the opportunities afforded him by the mistake, and the other party is innocent of blame."

See, also, *Mackintosh v. Renton*, 3 Wash. Ter. 431, 19 Pac. 144; 16 Cyc. 73, 75. There was in this case no statement or representation as to the law on the part of the respondents, and therefore such cases as *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609, and *Bjorklund v. Seattle Elec. Co.*, 35 Wash. 439, 77 Pac. 727, do not apply. The trial court reserved the case for further proceedings as between the appellant and the respondent Reser. As to the latter's liability, we express no opinion.

It follows from what has been said that the judgment must be affirmed, and it is so ordered.

Rudkin, C. J., Fullerton, Chadwick, and Morris, JJ., concur.

[No. 7536. Department One. September 27, 1909.]

Victor W. S. Denny, *Appellant*, v. J. H. Holden *et al.*, *Respondents*.[1]

Trusts — Resulting Trusts—Evidence—Sufficiency. In order to establish a trust in mining claims by virtue of a parol agreement, for an interest, the testimony must be clear, cogent, and convincing; and is insufficient, where the trust is based on a grub stake agreement whereby defendant was to prospect and locate mining claims for, and as an equal partner of, the plaintiff, who was to furnish the funds, and where the evidence as to such an arrangement is conflicting, the plaintiff and defendant were close friends, the plaintiff's letters indicate that at first he claimed no legal interest in the property, he did not furnish any of the money to develop the mine, made no claim to it during five years that it was being developed at great expense, and his evidence at the trial ten years after the agreement is unsatisfactory.

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered January 27, 1908, upon findings in favor of the defendants, dismissing an action to declare a trust in real property, and for an accounting. Affirmed.

William Martin and *John B. Denny*, for appellant.

Graves, Kizer & Graves, for respondents.

Gose, J.—The appellant commenced this action against the respondents, owners of the legal title to three certain mining claims in Chelan county, this state, for the purpose of obtaining a decree declaring him to be the owner in fee of an undivided one-half interest therein, and having the respondents declared to be the trustees therefor, and requiring them to convey such interest to him, and for an accounting. We will hereafter refer to the respondent J. H. Holden as if he were the sole respondent.

The complaint alleged that, in the fall of 1895, the appellant and the respondent entered into a verbal contract of partnership, to continue for an indefinite time, for the pur-

[1]Reported in 103 Pac. 1109.

pose of prospecting for mineral and locating mining claims in the county of Okanogan and elsewhere; that each party should defray one-half of the expenses of the enterprise; that all mining claims discovered, located, or acquired by either or both should be owned by them in equal parts; that pursuant thereto, in the spring of 1896, they secured the necessary outfit and supplies, and began and continued prospecting until the 24th day of July, 1896, at which time the respondent discovered and located three mining claims upon the public lands of the United States in what was then Okanogan county in this state, but now is Chelan county; that the respondent staked the claims and posted and recorded notices of location, in conformity with the Federal and state statutes; that the appellant paid more than one-half of the expense of procuring the outfit and provisions for carrying on the work, and otherwise performed the contract on his part; that the respondent, without the consent of the appellant and with intent to cheat and defraud him, filed and recorded the notices of location of each of the claims in his own name; that long prior and subsequent to the filing of the notices of location, the appellant and the respondent were close friends; that the respondent represented to him that keeping the claims in the name of the latter would add to the convenience of working and handling the properties; that the appellant, relying upon his statements, allowed the claims to remain of record in the name of respondent; that upon discovering that the respondent was asserting the entire ownership in the property, he demanded a conveyance to himself of an undivided one-half interest in each of the claims, and for an accounting, and that the appellant refused to comply with this demand. It is further alleged that the mining claims are of the value of $1,000,000. The answer admitted the discovery of the claims, the filing and recording of the notices, and assertion of the entire ownership in respondent, and denied that any partnership or other agreement was made having for its object the prospecting for mineral or the location of

mining claims. Upon issue being joined, the case was tried by the court, and a judgment of dismissal entered. From such judgment, this appeal is prosecuted.

The appellant seeks to establish a resulting trust by parol evidence, to show that the respondents, the owners of the legal title to the property in controversy, hold title to the extent of an undivided one-half interest in trust for him. In such case the evidence must be clear, cogent, and convincing before a trust will be declared. 3 Pomeroy, Eq. Jur. (3d ed.), 1040; 15 Am. & Eng. Ency. Law (2d ed.), p. 1174; *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Chambers v. Emery*, 13 Utah 374, 45 Pac. 192; *Rice v. Rigley*, 7 Idaho 115, 61 Pac. 290.

The following case also illustrates this view: *Voorhies v. Hennessy*, 7 Wash. 243, 34 Pac. 931.

The evidence shows that the three claims were discovered and located by the respondent July 24, 1896, upon which date he filed and recorded notices of location in his individual name; that the suit was commenced June 12, 1902; that an acquaintance between the parties, which soon ripened into a friendship, commenced in 1888 or 1889; that this friendship continued, seemingly unabated, at least until May, 1899; that the correspondence between them from some time prior to 1896, to May, 1899, was frequent, and that they had almost an affectionate regard for each other; that the respondent between 1889 and 1896 was frequently employed by the appellant's father; that at such times he lived with the latter, the then home of the appellant, and was treated almost as a member of the family; that in 1893 he prospected for the appellant in the Chelan district; that in 1894 he was with the appellant and other members of his family in the Chelan country as a guide; that in 1895 the respondent prospected in the Chelan country on his own account; that during the winter of 1895-6 he lived in the Denny home and worked for them. The facts heretofore stated seem to be undisputed.

The evidence further shows that some time in April, 1896, the appellant and the respondent left Seattle, the home of the former, and went to Lake Chelan; that there they procured a boat and some provisions and engaged principally in hunting and fishing until about May 12 following, when the appellant returned to his home; that they each paid one-half of the cost of the boat and provisions; that when the appellant returned home, he left his part of the provisions, amounting to a few dollars in value, his interest in the boat, and some personal effects, with the respondent; that at the lake he purchased and paid for two or three dollars' worth of provisions, and had them forwarded to the respondent; that the appellant did not again return to Chelan county in 1896; that in July following the departure of the appellant, the snow having disappeared in the mountains, the respondent began active prospecting, and soon discovered and located the mining claims in controversy; that about December, 1896, the respondent returned to Seattle and worked during the winter at the Denny home for his board; that the appellant advanced to the respondent a small sum of money on two separate occasions in 1896; that during the winter of 1896, the respondent borrowed a sum of money with which to work the claims, and in the early spring of 1897 returned to the mines, followed by the appellant about June 1 following; that the appellant worked at the mine with moderate regularity, without receiving wages, from some time in June to the 1st of September, 1897, when he again returned to Seattle; that he did not thereafter return to the mine; that in 1898 the respondent did the assessment work on the mine; that the respondent, without any assistance from the appellant, borrowed money, and sold a mining claim, and with this fund worked on the mine in 1897, and did the assessment work in 1898; that in 1899 and thereafter he sold mining stock and expended the proceeds in developing the mine; that at the time the suit was commenced, the respondent had

expended ten or twelve thousand dollars in opening the mine so as to make it productive.

The case was tried in November, 1907. The appellant, his wife and sister, testified that in the winter of 1895-6 the appellant and respondent agreed to outfit and prospect together in 1896 and share equally whatever was located by either. The wife and sister testified that, when the respondent returned to Seattle in the winter of 1896, he often referred to the fact that he and the appellant owned the mine together. A brother-in-law of the appellant, who worked in the mine in the summer of 1897, testified that the respondent told him on three separate occasions that the appellant owned an interest in the mine. Other witnesses called by the appellant gave evidence tending to support the appellant's claim. It is upon this evidence, and two letters written by the respondent, that the appellant relies to establish his case. On July 12, 1896, the respondent wrote the appellant as follows:

"R. R. C. July 12th, 1896.

"V. W. S. Denny, Seattle, Wn.

"Dear Friend:—Yours of June 28th at hand and contents read. In reply will say was glad to hear all was well and progressing. Hope you are in the Park ere this and are able to begin work. I am already to start up R. R. creek tomorrow morning. Mr. Robinson is with me. We have four horses here to pack up the creek. The snow I have all gone so I can go well up by this. I had a very pleasant time down the lake. . . . Win I do not need any funds now, aint out of grub yet, but don't know how soon I may be not for six weeks any way. Thanking you very much for your thoughts of me and my welfare should I find anything you will share equally with me."

On July 26, after filing the notices of location, the respondent again wrote a letter to appellant, from which we excerpt the following:

"Moore, Okanogan County, Wash., July 26th, 1896.

"Mr. V. W. S. Denny, Seattle, Wn.

"Dear Friend:—Your most valued letter with money came to hand a few days ago and reached me through Mr. Robin-

son. I was up R. R. Creek about 15 miles camped and as he passed he gave me the registered pkg. Well, Victor, I have lost in flesh as it have been warm and I have been hitting the hills hard. I send you a specimen of what I have found and if it proves good I am a rich man if not will, but toiling over these everlasting hills alone. I do not know the width of or thickness of the mineral, nor do I know the width of ledge. It is at least 20 feet and as far as I could pick across which is about 4 feet, is solid mineral like the two pieces rolled together. The other piece is from another part of the ledge. I want one of the two pieces tried and the single piece separate. It is only about 1500 feet from the creek with the finest timber for mine and cabin purposes that a body could wish. I have located 4 claims and their are on one place. Shows over 6 feet of solid mineral. The ledge so far shows more mineral than all the mines on Meadow Creek and Horse Shoe Basin. If it is any good I am in it, and *you are not left out.*" (The italics are the respondent's.)

In addition, the appellant testified that in November, 1897, he wrote the respondent a letter, demanding that the latter deed him a one-half interest in the property. He further testified that the respondent answered, saying: "If you sue me I will fight you to the bitter end. But if you do not you will still have your interest in the property." This letter was denied by the respondent and was not produced at the trial, the appellant stating that it had been lost. In 1902 the appellant served upon the respondent a written demand for a deed to a one-half interest in the property. The appellant testified that his father, D. T. Denny, knew of this partnership arrangement. On September 21, 1897, the latter wrote the respondent: "Every one is taken with the ore from your ledge. . . . Your property can be placed," etc. November 8 following he wrote him, "What is Victor's interest in the mine?"

The respondent testified, in substance, that no partnership or other joint agreement was made between the appellant and himself; that the appellant, at no time prior to the service of the demand in 1902, claimed to own any interest in

the property; that he had repaid the appellant for all loans and advances from the money he borrowed in 1896; that in 1896 and 1897 the appellant came to the Chelan country primarily for the benefit of his health; that he had worked the mines with money obtained as a loan, by the sale of mining claims in which the appellant did not claim any interest, and by a sale of mining stock without any aid or assistance from the appellant; that when the suit was commenced, he had expended ten or twelve thousand dollars in opening up the mining property to make it productive. On June 8, 1898, the appellant, in a letter to the respondent, said:

"Seattle, Washington, June 8th, 1898.

"Mr. J. H. Holden,

"Dear Friend:—Yours of the 3d rec'd yesterday. I did not know my father had written you about that $20.00. He asked me when we were up at Lake Kichelos that summer if I thought you needed it and I thought perhaps you did. As near as I can tell we sent $35.00 to you and the $20.00 note I gave you made $55.00. This just equals the amt you gave me last year, $35.00 here and $20 at the lake. I never expected you to pay me wages for my work. My expectation is that you will give me something if you make a stake."

And on November 16, 1897, he again wrote the respondent:

"Seattle, Wash. Nov. 16th 1897.

"Mr. J. H. Holden,

"Dear Friend: I was glad to hear you were down again and all right. Was afraid you would have a hard trip out. The folks are all well as usual. . . . I did not want my father to say anything about Austin's money as I knew you would not care to do it. Mr. Austin is all right I think, and will do the square thing. I did not want my father to say anything about my interest in the mine either, but will tell you why I thought I had an interest. On July 12th 1896 you wrote me a letter saying you were already to start up R. R., and if you found anything you would share equally with me. I have not given myself much concern about the matter as I believe you will do what is right by me. What I did for you in the past I did through friendship for you. More than once I gave you all the money I had and I don't

feel any different now. I have never done anything to injure you but have done my very best to make a good showing on the property. But should I never get anything I will not regret the past for we have had some very pleasant times together. So don't be troubled but let us be the good friends that we are. I will be very glad to see you this winter. Would like to have you stop with us a while if you care to. I hope you are well and hearty again."

On October 24, 1896, he wrote the respondent, "I paid Johnson for your assay;" and on March 10, 1897, he again wrote him, "That was a good return they got from your rock;" and on January 6, 1898, in a letter to respondent, he said: "The 'Chelan Leader' had you sold out. Also some women from the lake side said you had sold, or Arthur J. said so at least. Wont hurt them to think so though it may be true by this time."

After writing these several letters and until May 14, 1899, as we have seen, there was a continuous correspondence between the parties. Subsequent to November, 1897, the time the appellant testified that he wrote the respondent demanding a conveyance of a half interest in the mining claims, the record contains letters written by the appellant to the respondent on the following dates: In 1897, December 3, 11, and 22; in 1898, January 6, 15 and 30, February 18 and 28, March 8 and 28, April 21, May 7, July 1, October 30, November 22, and December 28; in 1899, January 1 and 22, March 8, April 2, May 14 and 26. These letters are pregnant with evidence of a close friendship, and indicate that the appellant was receiving letters from the respondent. In the dozens of letters in the record written by the appellant to the respondent, aside from those mentioned, there is nothing to indicate that the appellant claimed any interest in the property. They are friendship letters only.

They do, however, contain many things which point to the want of merit in the appellant's case. He testified that in 1896 the property was worth $100,000. In these letters he frequently refers to the intended and actual development

work on mining claims in which he was interested in the Lake Kichelos district in Kittitas county. He admitted that, from September, 1897, to the time the action was commenced, he had no information as to any work that was doing on the property in controversy, aside from what he saw in the newspapers. It is inconceivable that he would during all these years manifest no interest, other than a friendly one, in a property of such value, if at that time he entertained an honest belief of ownership to the extent of a one-half interest.

His own letters show that he was pressed for money; that he was much interested in the development of the other property; that he had almost a brotherly affection for the respondent, and hoped that the claims would develop into a valuable property. Moreover, one Austin, the party who loaned the respondent the money in 1896 with which to work the mine, and the Austin referred to in appellant's letter, testified that he was at the mine about a week in 1897; that each of the parties was there; that he was examining the property with a view to finding a buyer, and that he received no suggestion from any one to the effect that the appellant had an interest in the property. Referring to the appellant's letter of date November 16, 1897, written after the respondent had replied to the letter of D. T. Denny, stating that the appellant had no interest in the property, we find him saying: "But will tell you why I thought I had an interest. On July 12 you wrote me a letter saying you were already to start up R. R. If you found anything you would share equally with me." Why did he not say, in ringing words so clear as not to be misunderstood: "I own a half interest in the property. You and I made an agreement to prospect together, sharing equally what either or both discovered. We purchased the provisions, journeyed into the mountains, pitched our tent, and began work. I was compelled to return home, but left you provisioned so that you could and did continue under the contract. Your discovery inured to my benefit. My rights rest in contract, and I own and intend to assert and establish

my undoubted right to an equal interest in the result of our joint venture."

The whole matter was then, if ever, fresh in his memory. Is it not our duty to conclude that he would have resented a denial of his property rights in some such emphatic words? Such a conclusion seems inevitable. It squares with common observation and experience. It seems incredible that, after writing such a letter, he would have written another letter in two weeks demanding a conveyance of one-half interest in the property as a matter of absolute right. The indifference which he manifested to the property from 1897 to 1902, a property which he asserts was of the value of $100,000 in 1897, his conduct during that period, measured by what the ordinary man similarly situated would have done, explained as it is by his own letters, gives the strongest corroboration to the respondent's assertion of ownership. The letters suffer no loss by lapse of time.

The testimony of the appellant and his witnesses, read in connection with the letters, is but another evidence of the fallibility of human memory, and the lack of probative force of oral evidence as to statements made many years before the testimony was given. Experience and observation teach that, when ten years have intervened between the date of a conversation and the trial, the memory of witnesses as to verbal declarations made by another is the weakest kind of evidence. The law, in view of the liability of the human mind to err in remembering the statements and declarations of parties, receives and weighs such evidence with great caution. We are inclined to regard the language in the letters of the respondent, "Should I find anything, you will share equally with me," and in the later one, "If it is any good I am in it and you are not left out," as gratuitous expressions from one friend to another, when read in the light of the record as a whole. The appellant's letter shows that he did not expect to be paid for the work in 1897. He thought it would be recognized as

a moral obligation if the property developed into a paying mine.

Measured by the law as we announced it in the beginning, we conclude that the appellant has not established his case by that clear, cogent and convincing evidence which the law requires, and the judgment will be affirmed.

RUDKIN, C. J., FULLERTON, and CHADWICK, JJ., concur.

[No. 8001. Department One. September 27, 1909.]

ESTA MEISENHEIMER, *Respondent*, v. ALLEN MEISENHEIMER, *Appellant*.[1]

JUDGMENT — DECISION AS TO JURISDICTION — COLLATERAL ATTACK. Where a party appears specially to object to a proceeding for want of due service, and the court, having jurisdiction of the subject-matter, decided that due service was made and that it has jurisdiction to proceed to judgment on the merits, such judgment cannot be collaterally attacked for want of service.

COURTS — MOTIONS — JURISDICTION — JUDGMENT — VACATION — RES JUDICATA. Under Bal. Code, § 4766, giving an attorney authority to bind his client by agreement, and Id., § 4668, authorizing a superior judge of one county to hold a session of the court at the request of the judge of another county, at the seat of judicial business, and Laws 1901, p. 76, § 2, authorizing any judge who has heard a motion or case in any county outside his district to decide or determine the same in any county in the state, the parties to an action in D. county may stipulate that a motion to vacate the judgment may be heard at the county seat of S. county, before the superior judge of W. county, and upon entry of an order accordingly and transfer of the papers, such trial judge has jurisdiction to hear and decide the motion, the parties having appeared by counsel and argued the same; and his order is *res judicata*.

JUDGMENT — APPEARANCE — CONSENT — JURISDICTION — HEARING AT CHAMBERS. After appearance before a judge and presentation of a motion, it cannot be objected that the judge heard the motion "in chambers" instead of in open court in the court house, Const. art. 4, § 6, providing that the courts shall always be open.

[1]Reported in 104 Pac. 159.

JUDGMENT—VACATION—CONCLUSIVENESS—MOTION AS BAR TO ACTION. Where a motion to vacate a judgment is made within one year, under Bal. Code, §§ 5153, 5156, and the motion is denied and no appeal taken, the order is *res judicata* and a bar to an independent action to vacate the judgment on the same grounds.

JUDGMENT—VACATION—FRAUD OF ATTORNEY—ERROR OF LAW. A judgment will not be vacated because of collusion of the party's attorney in stipulating to dismiss an appeal, where it appears that he only made an error of law, "intending to bring another action," which however was barred by the former judgment.

JUDGMENT—ESTOPPEL BY RECORD—PARTIES—CRIMINAL AND CIVIL CASES. A husband who had obtained a divorce is not estopped from asserting the validity of the decree, when attacked by the wife, by the fact that he successfully defended a prosecution for perjury in obtaining the divorce by insisting that the evidence showed the judgment of divorce to be void for want of due service of process; since the parties were not the same in the two proceedings.

DIVORCE—ACTION TO VACATE—CONCEALMENT OF PROPERTY. A decree of divorce will not be vacated, after the remarriage of the plaintiff, because a large amount of community property had been concealed from the court and was not disposed of; since the same becomes common property, and can be recovered in a proper action.

Appeal from a judgment of the superior court for Douglas county, Steiner, J., entered January 18, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to vacate a decree of divorce. Reversed.

Graves, Kizer & Graves, and *Merritt, Oswald & Merritt*, for appellant.

W. E. Southard, Southard & Southard, and *Robertson, Miller & Rosenhaupt*, for respondent.

GOSE, J.—This action, instituted by the respondent to vacate a decree of divorce theretofore entered against her, resulted in a decree in her favor, from which this appeal was taken. The complaint, which is quite lengthy, in substance alleged, that the appellant and the respondent were married on November 27, 1899; that because the appellant was then

engaged to marry another woman, the marriage was concealed from the public; that on December 27, 1904, the appellant, through fraudulent means, procured a decree of divorce to be entered in the superior court of Douglas county; that the fraud consisted in this, that at the time of the commencement of the action and the entry of the decree, the appellant was a resident of Adams county; that the decree was entered upon the service of a summons entitled in the superior court of Adams county; that the cause for divorce alleged in the complaint was abandonment on the part of the respondent, when, as the appellant well knew, there had been no abandonment; that the respondent, after the service of summons and complaint, relying upon the promise of the appellant and his attorney that he would protect her interests and that no valid separation or divorce would be had, and that if necessary he would remarry her, neither employed counsel nor appeared in the action; that at the trial the appellant testified that the respondent had abandoned him, well knowing such evidence to be false and untrue; that the appellant was prosecuted on the charge of perjury in the superior court of Douglas county, for giving false testimony therein; that upon the trial he and his counsel therein claimed that the divorce proceedings were void; that the court had no jurisdiction because no summons, other than the one entitled in the superior court of Adams county, was served, and upon the motion of the appellant the jury was instructed to that effect; that the appellant concealed from the court a large amount of community property held in trust by various parties, of the value of $150,000; that after the entry of the decree the appellant married one Maud Motley, who knew of the respondent's rights; that thereafter the respondent employed an attorney to procure the vacation of the decree, and that he conspired with the appellant to defraud her of her marital and property rights; that the respondent had at all times a meritorious defense to the action, and that she did not abandon the appellant. The prayer is that the decree

and the order of Judge Chadwick, hereafter spoken of, be vacated, and that the respondent be restored to her marital rights. The answer joined issue on all the allegations of fraud and want of jurisdiction.

On November 1, 1905, ten months after the entry of the decree and four months after the marriage of appellant to a third party, the respondent filed a motion in the original action to vacate the decree. The motion is as follows:

"Comes now the above named defendant, Esta Meisenheimer, and appearing herein specially for the purpose of this motion and for no other purpose moves the court:

"(1) To quash, vacate, set aside and hold for naught the summons and proof of services thereof in the above entitled cause.

"(2) To vacate, set aside, hold for naught and strike from the records herein the findings of fact and conclusions of law filed in the above court in the above entitled action on the 27th day of December, 1904.

"(3) To vacate, set aside, hold for naught and strike from the files of said court the decree and judgment heretofore entered in the above entitled court in favor of the plaintiff and against the defendant signed and entered on the 27th day of December, 1904.

"(4) To dismiss the above entitled cause and action for the reason and on the ground that no service of the pretended summons on file herein was had or made upon the defendant as required by law or at all.

"All for the reason and on the ground that the court was without jurisdiction for the reason that no summons in the above entitled cause was served upon the defendant as required by law or at all.

"This motion is made upon all the papers, pleadings and files herein and upon the affidavit of the defendant hereto attached and the copy of the summons mentioned in said affidavit, the original of which defendant prays permission of this court to bring into court on the hearing of this motion and to exhibit same and to have same read in and made of evidence and a part of the record on said hearing in support of this defendant's motion."

The motion was heard upon the record and the affidavits of

the parties. The counter affidavit of the respondent presented the principal facts pleaded in the complaint in the instant case in detail. Thereupon, the parties stipulated as follows:

"It is hereby stipulated and agreed by and between the parties to the above entitled cause, through their respective attorneys, that said cause may be heard before Hon. S. J. Chadwick, judge of the superior court of the state of Washington, for Whitman county, provided the said Judge Chadwick will hear the motion to vacate the decree in said cause, in the city of Spokane, and it is stipulated and agreed that said motion may be heard in Spokane at any time to suit the convenience of the said S. J. Chadwick. It is further stipulated and agreed that for the purpose of carrying out this stipulation the clerk of the superior court of the state of Washington for the county of Douglas, shall transfer the original files to the clerk of Spokane county."

A copy of the stipulation with the following letter was then mailed to Judge Steiner, the superior judge of Douglas county:

"Spokane, Wash., March 17, 1906.

"Hon. R. S. Steiner, Wenatchee, Wash.

"My Dear Judge: For the convenience of parties and witnesses Mr. Belden and ourselves have stipulated that the motion in the Meisenheimer case might be heard before Judge Chadwick, he coming here to Spokane to hear it, and he has consented to do so. We do not change the venue of the case, but simply have Judge Chadwick act and hear the motion here. We enclose you a copy of the stipulation, the original having been sent to the clerk at Waterville. We desire very much that you approve this arrangement and direct the clerk to send the files to the clerk of Spokane county to be under his charge while this matter is being heard. Hoping that you will do this, we are, Yours very truly,

"Dic. J. W. M. Merritt & Merritt."

Upon the stipulation and the letter, Judge Steiner made the following order:

"On reading the foregoing letter, and copy of stipulation therewith, it is ordered that the cause therein referred to be transferred to the superior court for Spokane county for the

purpose indicated, and that the clerk of the superior court for Douglas county transmit the papers in said cause to the clerk of the superior court for Spokane county.

"Dated at Wenatchee, March 19, 1906.

"R. S. Steiner, Judge."

On June 15, 1906, Judge Chadwick, sitting in the city of Spokane, heard the motion, affidavits, and argument of counsel; whereupon he made the following order:

"This cause coming on to be heard this 15th day of June, 1906, before the Honorable S. J. Chadwick, judge of the superior court of the state of Washington, for Whitman county, under the provisions of the stipulation herein, upon the motion of the defendants to vacate and set aside the decree entered in said cause, on the 27th day of December, 1904, hereinbefore filed in said cause, and the plaintiff appearing by O. R. Holcomb and Merritt & Merritt, his attorneys, and the defendant appearing by E. H. Belden, her attorney, and before proceeding with the argument upon said motion the defendant in open court moves to strike from the said motion ground four (4) thereof, and no objection being made thereto, it was ordered by the court that said ground be stricken, and held as waived by the defendant, and the court having heard the argument of counsel upon said motion to vacate and set aside said decree, and being sufficiently advised in the premises, overruled the same. It is therefore ordered and adjudged that said motion to vacate the said decree be and the same hereby is overruled and denied, to which ruling of the court defendant excepts, and exception is allowed.

"S. J. Chadwick, Judge."

The order was filed in the superior court of Douglas county January 10, 1907, and an appeal taken therefrom February 26 following, which was dismissed on May 3 following, upon the stipulation of counsel for the respective parties. At the time of the hearing of the motion, the respondent knew and presented all the facts which she now urges in support of the decree in the instant case, except the alleged collusion between her then counsel and the appellant, and the estoppel hereafter noticed.

The respondent first urges with great zeal that the evidence

discloses that the only summons served in the divorce action was one entitled in the superior court of Adams county, whilst, as we have seen, the decree was entered in the superior court of Douglas county; and that, for this reason, the court was without jurisdiction, and the decree is void. Conceding for the moment the service to be as the respondent states, the conclusion which she deduces does not follow. The record is regular. The original summons was properly entitled and fair upon its face. The return shows personal service in Adams county. Let us suppose that the respondent had appeared specially in the action, and moved to quash the service because the summons served upon her was entitled as she claims; that she had presented her evidence in that behalf, and that the appellant had supported the record, as he did in this case, with the evidence of Judge Holcomb and R. C. Holcomb, to the effect that she was served with a copy of the original summons as it appears in the record; that the court had denied her motion; that she had declined to plead further, and upon the hearing upon the merits the decree had been entered and no appeal taken. What, then, would have been the status of the case? Surely no one upon such a record would have the temerity to urge that the decree would be void. The hypothesis would have presented primarily a question of fact, viz., which summons was served. An erroneous determination of a fact properly submitted cannot render a judgment void. The same is true as to every other fact relied upon for procuring the decree. The court necessarily found that there had been a proper service; that the parties were husband and wife; that the appellant was a resident of Douglas county, and that the respondent had abandoned the marriage relation more than a year before the filing of the complaint.

Mr. Black, in his work on Judgments, § 170, speaking of a void judgment, says: "It is not necessary to take any steps to have it reversed, vacated, or set aside." In *Wright v.*

Douglas, 10 Barb. 97, the court, in commenting on this question, said:

"But when the jurisdiction depends on a fact that is litigated in a suit, and is adjudged in favor of that party who avers jurisdiction, then the question of jurisdiction is judicially decided, and the judgment record is conclusive evidence of jurisdiction, until set aside or reversed by a direct proceeding by appeal or a writ of error."

"In the case of an attempted service of process, the presumption exists that the court considered and determined the question whether the acts done were sufficient or insufficient. If so, the conclusion reached by the court, being derived from hearing and deliberating upon a matter which, by law, it was authorized to hear and decide, though erroneous, cannot be void." Freeman, Judgments (3d ed.), § 126.

"A judgment is not void in the legal sense unless its invalidity appears upon the record. It is voidable merely." 1 Bailey, Jurisdiction, § 136.

"The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes." 1 Black, Judgments, § 218.

"A judgment rendered, without in fact bringing the defendants into court cannot be attacked collaterally on this ground, unless the want of authority over them appears in the record, it is no more void than if it were founded upon a mere misconception of some matter of law, or of fact, occurring in the exercise of an unquestionable jurisdiction." Freeman, Judgments (3d ed.), § 116.

"By the filing of the complaint the court obtains jurisdiction of the subject-matter, and by the service of the summons, of the person of the defendant; and every fact not negatived by the record will be presumed in aid of the judgment, and it will only be held void when it affirmatively appears from the record that the court had no jurisdiction to render it." *Munch v. McLaren*, 9 Wash. 676, 38 Pac. 205.

See, also, *Rogers v. Miller*, 13 Wash. 82, 42 Pac. 525, 52 Am. St. 20, and *Kizer v. Caufield*, 17 Wash. 417, 49 Pac. 1064.

Did Judge Chadwick, sitting in Spokane county, have jurisdiction to hear and determine the motion to vacate the decree? It cannot be doubted that Judge Steiner, the parties consenting, could have done so. The stipulation was that Judge Chadwick, a superior judge of the state of Washington for Whitman county, should hear the motion in the city of Spokane. The order of Judge Steiner was that the papers be transferred to the superior court for Spokane county for the purpose indicated in the stipulation, viz., that the motion might be heard by Judge Chadwick for the convenience of the parties and witnesses. The venue of the case had not been changed. Our code, Bal. Code, § 4766 (P. C. § 3188), provides that an attorney has authority "to bind his client in any of the proceedings in an action or special proceeding by his agreement duly made, or entered upon the minutes of the court." Pierce's Code, § 4380 (Bal. Code, § 4668), provides that the judge of a superior court of one county, when requested by the judge of the superior court of another county, may "hold a session of the superior court of the county" whereof such request shall have been made, "at the seat of judicial business of such county." Pierce's Code, § 4378 (Laws 1901, p. 76, § 2), provides that:

"Any judge of the superior court of the state of Washington who shall have heard any cause, either upon motion, demurrer, issue of fact, or other matter in any county out of his district, may decide, rule upon, and determine the same in any county in this state, which decision, ruling and determination shall be in writing, and shall be filed immediately with the clerk of the county where such cause is pending."

The order of Judge Steiner was, in substance and effect, when construed with the stipulation and letter of counsel, a request of Judge Chadwick to hear the motion in the city of Spokane, and was so construed by the parties. Broadly interpreted in the light of the record, with a view to effectuate the legislative intent, the several statutes conferred jurisdiction on Judge Chadwick to determine the motion, and the judgment entered by him was *res judicata*. The motion was

not determined until the judgment was filed with the clerk. *Northern Counties Inv. Trust v. Hender*, 12 Wash. 559, 41 Pac. 913.

Moreover, jurisdiction of the parties was obtained by their appearance, and the subject-matter was one over which the superior courts have general jurisdiction derived from the constitution. This being true, a party cannot appear before a judge or a court acting at his instance, have a full and fair hearing upon the merits, and then question jurisdiction because of an adverse decision.

In *Lillie v. Trentman*, 130 Ind. 16, 29 N. E. 405, at page 406, the court, in discussing this question, said:

"A practice that would permit a party litigant to proceed for months before a *de facto* judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings, or not disposed to go into trial when the cause is ready for trial, to be able in a moment to arrest proceedings and oust the jurisdiction of the judge, cannot be tolerated. The whole tendency of the later cases in this court has been in the direction of requiring such objections to be promptly made, and to hold that, if not made promptly, they are to be deemed waived."

In *State ex rel. Cougill v. Sachs*, 3 Wash. 691, 29 Pac. 446, a judgment entered by a judge *pro tempore* had been vacated because the judge had not been appointed by an agreement in writing signed by the parties or their attorneys and approved by the court. In reversing the judgment, it is said, at page 694:

"He was estopped by his action in appearing and trying the cause before the judge *pro tempore*, without objection, and could not be heard to raise the question thereafter."

Speaking to this question, in *State v. Holmes*, 12 Wash. 169, 40 Pac. 735, 41 Pac. 887, at page 180, the court said:

"The rule compelling the defendant to raise timely objection to the jurisdiction of the court is based upon principles of right and fair dealing. The statute is liberal in protecting the rights of a defendant in criminal actions, and ample opportunity is given him to present objections to anything

which is prejudicial to his rights. Knowing the ineligibility of the judge who tries his case, and yet submitting himself to the jurisdiction, being ready to avail himself of the action of the court if the verdict should be in his favor, he should not in justice be permitted to object to such jurisdiction when it eventuates that the verdict is against him. Such a practice would tend to defeat justice rather than to secure to the defendant his substantial rights."

In *Smurr v. State*, 105 Ind. 125, at page 133, 4 N. E. 445, it is said:

"We have many cases declaring that where a party goes to trial without objection before a judge assuming to act under color of authority, he cannot, after judgment or conviction, successfully make the objection that the judge had no authority to try the cause;"

citing numerous cases.

In *Rogers v. Loop*, 51 Iowa 41, 50 N. W. 224, it was held that, where the parties stipulated that a justice of the peace of one township should hear the case in another township, and appeared before him and had their cause heard and determined, the losing party could not thereafter be heard to raise the question of jurisdiction. In that case the court, recognizing the fundamental principle that consent of parties cannot confer jurisdiction over the subject-matter of an action where the law does not confer it, and by way of illustration, said a justice of the peace could not exercise jurisdiction by consent of the parties where the amount involved or the general question to be determined was not cognizable by such a court.

The respondent also urges that Judge Chadwick, sitting in chambers, was without jurisdiction to hear the motion. The constitution, art. 4, § 6, provides that the superior court shall always be open except on nonjudicial days. Whether we treat the judgment as the act of the judge or the act of the court, the effect will be the same. Under our judicial system it cannot be successfully contended that an act done by a judge sitting on the bench where no jury is required has any

greater legal force than the same act done by him in an adjoining room by courtesy styled his chambers. Moreover, he sat at the time and place agreed upon by the parties, and neither can now complain that he sat at a place in the city of Spokane other than the courtroom. These observations, of course, would not apply to a case where a superior court judge or a superior court undertook, without objection, to determine questions where the power to determine them had not been conferred by the constitution on superior courts.

The motion to vacate the decree was made in pursuance of the provisions of our code, Bal. Code, § 5153 (P. C. § 1033). Such proceedings must be commenced within one year. Bal. Code, § 5156 (P. C. § 1036). As we have seen, the motion, whether treated as a motion proper or an unverified petition, was supported by affidavits which presented all the questions of fact sought to be raised by the complaint in the instant case, except as herein noted. This is true with paragraph 4 eliminated, as will appear from reading the motion. The respondent attached an Adams county summons to her original affidavit, and the question of jurisdiction was therefore before Judge Chadwick. The respondent having sought to vacate the decree by a motion, that method is exclusive, and she cannot again seek the same relief in an independent suit upon facts that existed and were known to her when she adopted the former method. In discussing this question in *McCausland v. Bailey*, 51 Wash. 183, 98 Pac. 327, we said:

"When the court refuses to vacate a judgment, the whole matter in controversy is ended; and upon the trial of the cause in the equitable action to set aside the judgment, the result is exactly the same. There were two modes of attack, either of which could have been adopted by the appellants in this case; to move directly in the tax foreclosure to vacate the judgment, as in the case just cited, or to bring an independent suit in equity for that purpose, as the appellants here have done."

In *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955, in discussing the construction of the provisions of

our code, Bal. Code, §§ 5153 to 5162 (P. C. §§ 1033, 1039), at pages 499 and 500, it is said:

"As already said, the statute affords a full, complete, and adequate remedy. Such being the case, it must be regarded as exclusive; and, having unsuccessfully sought to obtain a decision in their favor by resorting to that proceeding, plaintiffs are bound by such decision, and cannot avoid the effect of it by an action like the present."

In *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748, a decree of divorce had been entered and a motion to vacate the decree denied. Later, a petition to the same effect having been denied, an appeal was taken. We held that the remedy was by an appeal from the order denying the motion to vacate, instead of by a petition based upon the same facts. In *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164, at page 604, we said:

"It is therefore firmly established by the decisions of this court that an order denying a motion to vacate a judgment is a bar to any subsequent proceeding seeking the same relief, ..."

See, also, *Wilson v. Seattle Dry Dock & Ship Bldg. Co.*, 26 Wash. 297, 66 Pac. 384; *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *State ex rel. Post v. Superior Court*, 31 Wash. 53, 71 Pac. 740. We have examined *Payette v. Ferrier*, 20 Wash. 479, 55 Pac. 629; *Long v. Eisenbeis*, 21 Wash. 23, 56 Pac. 933; *Bingham v. Keylor*, 25 Wash. 156, 64 Pac. 942, and *Snyder v. Harding*, 38 Wash. 666, 80 Pac. 789, cited by the respondent, and are not persuaded that they announce a different rule.

Two questions remain which were not presented at the hearing upon the motion. First, it is alleged that the respondent's attorney conspired with the appellant to defeat her rights. He stipulated to dismiss the appeal from the judgment entered on the motion to vacate the divorce decree. He testified that he did so because he "came to the opinion that Judge Chadwick's opinion was correct. . . . I intended to bring another action." Granting that he erred in

judgment, the presumption is that the mistake was an honest one. Fraud and error are not synonymous terms. We have read all the evidence, and the charge finds no support in the record.

It is urged that the conduct of the appellant in the trial of the criminal case was not submitted to Judge Chadwick, and that it estops him from asserting the validity of the decree. The evidence shows that the perjury case was tried after the respondent filed her motion and affidavit to vacate the decree. W. J. Canton, the prosecuting attorney of Douglas county, who tried the perjury case for the state, gave evidence that no witness, other than the respondent, testified to the service of the summons; that the Adams county summons was introduced in evidence by the appellant on cross-examination of the respondent, and as a part thereof. The evidence shows an utter absence of the essential elements of estoppel. A defendant in a criminal case has an undoubted right to have all the state's evidence and the applicable law submitted to the jury.

In *Butler v. Supreme Court of Foresters*, 53 Wash. 118, 101 Pac. 481, a husband had left his home on July 7, 1898, intending to return in a few days. His wife paid the dues on a life policy which he held in the defendant company, until February 28, 1900. In April, 1900, the wife instituted proceedings for divorce, alleging her husband's desertion. In due time the decree of divorce was entered. In 1906, after the expiration of seven years, the wife commenced an action to recover on the policy, on the ground of the death of her husband. The defendant pleaded that she was estopped; that having brought her divorce action on the theory that her husband was alive, she could not later, in another action, contend that he was dead when the former action was commenced. In holding that there was no estoppel, at page 484, we said:

"Estoppels operate only towards parties or privies, and the party who pleads an estoppel must be one who had in good faith been led to his injury."

In the perjury case, it is obvious that the parties were the state and the appellant. The respondent was in no sense a party. Moreover, the respondent knew this fact when she presented her motion, and as we have said, it was her duty to present all her facts at that time.

The complaint alleged that a large amount of community property, held in trust by various persons, was concealed from the court and not disposed of in the decree. If this is true, the property or its avails is now common property, and the respondent in a proper proceeding with proper parties can have her rights determined. This question was not litigated either before Judge Chadwick or here. The primary purpose of the action was to vacate the decree, leaving the parties husband and wife. *James v. James*, 51 Wash. 60, 97 Pac. 1113; *Ambrose v. Moore*, 46 Wash. 463, 90 Pac. 588, 11 L. R. A. (N. S.) 103.

The view we have taken of the case makes it unnecessary to discuss other questions of law suggested by counsel based on a different theory of the law. The decree will be reversed, with directions to enter a judgment for the appellant for costs.

RUDKIN, C. J., FULLERTON, and MORRIS, JJ., concur.

[No. 8038. Department One. September 27, 1909.]

LINCOLN MEADOR, *Respondent*, v. NORTHWESTERN GAS & ELECTRIC COMPANY, *Appellant*.[1]

CONTRACTS—PERFORMANCE—EVIDENCE—SUFFICIENCY. In an action to recover one thousand dollars due upon the performance of a contract to furnish certain amusement attractions for one month, a verdict for $525 is supported by the evidence, where it appears that plaintiff performed the contract in so far as not excused or prevented from performing by the defendant.

APPEAL—REVIEW—VERDICT. A verdict will not be set aside when supported by substantial evidence, even if contrary to the opinion of the court.

APPEAL—ERROR FAVORABLE TO APPELLANT—TRIAL—VERDICT. A verdict for a less sum than was due for complete performance of a contract, is not a conclusive finding of nonperformance in its entirety; and is not error prejudicial to the defendant.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered December 11, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Rader & Barker, for appellant.

Cain & Hurspool, for respondent.

FULLERTON, J.—The appellant, the owner and operator of an interurban electric railway, and the respondent, who owned an amusement park on the line of the railway, entered into the following written agreement and supplemental agreement:

"This contract entered into in duplicate this third day of June, 1908, by and between the Northwestern Gas & Electric Company, a Washington corporation, doing business in Washington and Oregon, party of the first part, and L. Meador, of Walla Walla, Washington, party of the second part.

"Whereas the party of the first part is operating a street railway system between Walla Walla, Washington, and Mil-

[1]Reported in 103 Pac. 1107.

ton, Oregon, and will be benefited by having an amusement park at the Walla Walla river, where the line crosses the same;

"The party of the second part is equipping and furnishing a park known as Meador Park near where the railway line of the party of the first part crosses the Walla Walla river and is desirous of securing music for the park amusement for the months of June, July and August, 1908.

"Now be it agreed as follows: that the party of the first part will pay to the party of the second part the sum of One Thousand ($1,000) dollars for each of the months of June, July and August, payment to be made on or before the 10th of each month for the amount earned during the preceding month, and the party of the second part agrees to keep the place well lighted and furnished for the months of June, July and August, the Walla Walla Band, the same to consist of not less than twenty pieces, $5 for leader and $2.50 each man for concerts for at least two concerts on separate days each week; further to furnish Frederick Runkles Colonial Orchestra of not less than eight pieces; or some other band of an equal number of pieces to be approved by the first party, for the months of June, July and August; said band to furnish music for one concert or dance daily and two on Sunday. First party to stop all cars going each way at station, now in use near said park.

"The said party of the second part shall keep all the amusements now installed in Meador Park or which may hereafter be installed therein, including the chutes and dance pavilion, going during the life of this contract;

"It is further agreed that the party of the first part shall furnish the party or parties of the second part lights on the following basis—fifty (50c) cents per sixteen candle power lamp used for each month and power at Five ($5) dollars per horse power for each horse power used for each month. This clause referring to payment for lights to apply only to the month of June. It being understood that a further agreement regarding the lighting is to be made for the balance of the season;

"The failure of the party of the second part to keep and perform the provisions herein set forth by said party, will cancel this agreement and all obligations on the party of the first part shall cease and this agreement become void.

"This agreement shall be binding upon the parties hereto,

their heirs or assigns, and shall be in lieu of all former contracts between the parties hereto."

"SUPPLEMENTAL CONTRACT.

"It is hereby mutually agreed between the parties hereto that inasmuch as it will be impracticable to commence operating the Park mentioned in the foregoing contract and secure the music therein provided for before the seventh of June, 1908. Therefore this contract shall be deemed to begin to run from the seventh day of June, 1908, and to extend to and include the seventh day of September, 1908, during all of which time the parties to this contract shall comply with the several details thereof."

The sums stipulated in the contract to be paid by the appellant to the respondent were paid for the months of June and July, but payment for the month of August, due on September 10, 1908, was refused. This action was thereupon begun to recover the same. In his complaint, the respondent alleged the execution of the contract, its due performance on his part, and the refusal of the appellant to make the last payment provided for therein. For answer the appellant denied due performance of the contract on the part of the respondent, and by way of an affirmative answer, alleged in what particulars the contract had not been performed; averring that certain of the amusements referred to in the contract were not kept therein or kept in operation during the life of the contract; that the respondent failed to furnish a band for giving concerts at the park after August 27, 1908; further alleging that the park was not kept well lighted during the term of the contract. The reply put in issue the allegation of the affirmative answer as to certain of the amusements enumerated, and sought to excuse nonperformance as to certain others by averring that performance had either been prevented or excused by the appellant.

On the issues thus presented a trial was had before a jury, which resulted in a verdict and judgment in favor of the respondent for the sum of $525. Evidence was introduced at the trial by each of the parties tending to support the allega-

tions of their respective pleadings. At the conclusion of the evidence, the court instructed the jury to the effect that the contract was a contract of entirety, and that unless the respondent had shown a substantial performance of the contract on his part, or a waiver of performance by the appellant, he could not recover.

The errors assigned for reversal can be reduced to one principal question, namely, the sufficiency of the evidence to justify the verdict. In support of this assignment, the appellant quotes from the record evidence tending to show a failure to perform the contract in its entirety on the part of the respondent, and contends that the jury have so found, since they returned a verdict for a sum much less than the sum to which the respondent would have been entitled had he fully performed his contract.

But we do not think the assignment is well founded. A perusal of the record convinces us that there was some substantial evidence tending to show that the respondent performed his part of the contract, in so far as he was not excused or prevented from performing by the appellant. This is sufficient to sustain the judgment in this court. The weight and sufficiency of evidence is for the consideration of the jury, and their verdict must be sustained in the appellate court when supported by substantial evidence, even though the court should be of the opinion that the weight of the evidence is against the verdict.

Nor is the fact that the jury returned a verdict for less than the stipulated sum provided in the contract for complete performance conclusive that the jury found that the contract was not performed in its entirety. Such a verdict may be erroneous, but in this jurisdiction, unless objected to at the time it is rendered, it must be set aside on the complaint of the party injured thereby; and a litigant is not injured by a verdict returned against him for a sum less than the jury might properly have returned. *Jose v. Stetson*, 20 Wash. 648, 56 Pac. 397; *Seattle Brewing & Malting Co. v. Dono-*

frio, 34 Wash. 18, 74 Pac. 823; *Graham v. Bell-Irving*, 46 Wash. 607, 91 Pac. 8.

There is no reversible error in the record, and the judgment will stand affirmed.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 7888. Department One. September 29, 1909.]

CHARLES S. STAATS, *Respondent*, v. PIONEER INSURANCE ASSOCIATION, *Appellant*.[1]

INSURANCE—POLICY—LIMITATION OF TIME FOR SUIT—VALIDITY. The clause in a fire insurance policy that no action shall be sustainable unless commenced within six months, is valid as a limitation, but does not go to the question of original liability.

SAME—WAIVER OF LIMITATION—AUTHORITY OF AGENT—ESTOPPEL. The clause in a fire insurance policy that no action shall be sustainable, unless commenced within six months after the fire, is waived, where the insured was induced to postpone action by the representations of the adjuster that he found the claim honest, and that the insurer would do whatever the other companies did, if he would wait until they acted, the adjuster being clothed with apparent authority to act for the insurer.

SAME—LACHES—DELAY IN BRINGING SUIT AFTER WAIVER. Where an insurance company waived the six months time limit for commencing suit until other companies had settled, a delay of twenty-five days thereafter is not, as a matter of law, so unreasonable as to preclude a recovery.

INSURANCE—STIPULATION AGAINST OTHER INSURANCE—WAIVER. A clause in a policy of fire insurance against other insurance is waived where, at the time the policy was issued, other insurance on the property was disclosed to the agent to the extent of $4,000; and the waiver is not affected by the fact that a "rider" was attached, expressly consenting to $2,000 additional concurrent insurance.

INSURANCE—AGENCY—AUTHORITY OF AGENT—QUESTION FOR JURY. It is for the jury to determine whether an insurance agent had authority to represent a fire insurance company, where all the negotiations were had with him and he assumed to act as agent for a com-

[1]Reported in 104 Pac. 185.

pany whose name was not disclosed until the policy was delivered, countersigned by other agents, and the policy was written by the other agents through him as their intermediary, and the premium paid to him was accepted by the company.

INSURANCE—POLICY—NOTICE OF OTHER INSURANCE—ORAL EXPLANATIONS—EVIDENCE—ADMISSIBILITY. In an action on a policy of fire insurance stipulating against other insurance, to which a rider was attached authorizing $2,000 additional concurrent insurance, when, at the time of delivery of the policy, the insured already had $4,000 of other insurance on the property, parol evidence is admissible of the statements of the agent explaining that the prohibitory clause did not relate to "prior" insurance, and that the rider was intended to authorize $2,000 in addition to what the insured already had on the property, for the purpose of showing notice to the agent of such other insurance.

INSURANCE—ACTIONS — PLEADINGS — ESTOPPEL — AMENDMENTS TO CONFORM TO PROOF. Where evidence of an estoppel or waiver as to a clause forfeiting an insurance policy is admitted without objection, the plaintiff's pleadings will be deemed amended to properly set up the estoppel.

INSURANCE — POLICY — VALIDITY — ACCEPTANCE OF PREMIUMS — WAIVER OF OBJECTIONS. The acceptance of the premium for a policy through the agent who assumed to act for the company in issuing the policy, with all knowledge of the facts, affirms the validity of the policy, and waives all objections that the insurance never took effect.

INSURANCE—POLICY—STIPULATIONS AGAINST WAIVER—AGENTS—AUTHORITY. A clause in an insurance policy that no agent is authorized to waive proofs of loss or admit liability, does not prevent the waiver of clauses in the policy at the time of its issuance and the acceptance of the premium.

APPEAL—REVIEW—EXHIBIT NOT IN RECORD. Error cannot be predicated upon the admission in evidence of an exhibit which is not in the record on appeal.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTION TO INSTRUCTIONS—NECESSITY—NEW TRIAL. In an action upon a fire insurance policy, error cannot be predicated on the denial of a new trial because the evidence showed an increase in the hazards, in violation of the policy, where no exception was reserved to the instruction submitting that question to the jury.

TRIAL—INSTRUCTIONS—WEIGHT TO BE GIVEN FACTS. It is not error to instruct the jury that they are exclusive judges of all questions of fact and the "weight to be given any particular fact," especially when immediately followed by an instruction that it is their duty to accept the law from the court.

TRIAL—INSTRUCTIONS—PLEADINGS AS EVIDENCE—ADMISSIONS. An instruction that the pleadings taken to the jury room are not evidence, and that the jury must determine the cause from the evidence and admissions laid before them, is not objectionable as precluding the jury from considering admissions in the pleadings, where the court had previously pointed out certain admissions in the pleadings.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered August 4, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a policy of fire insurance. Affirmed.

Granger & Magill, for appellant.

Fred Parker, for respondent.

GOSE, J.—The respondent, the plaintiff below, commenced this action to recover from the appellant the amount of loss sustained on account of the burning of his stock of goods, which had theretofore been insured by the latter against loss by fire. From a judgment entered upon a verdict in favor of the respondent, this appeal is taken.

The complaint avers, that on the 5th day of September, 1906, the appellant, a corporation organized and doing a fire insurance business in the state of Washington, issued to respondent its policy, whereby it insured his stock of goods against loss by fire in the sum of $2,500, for the term of one year; that when the policy was issued, the respondent had the goods insured against like loss in the sum of $4,000 in three policies, one for $2,000 and two for $1,000 each, which fact he then disclosed to the appellant; that on October 30, 1906, the goods were destroyed by fire, and that respondent's loss was about $9,000; that the respondent immediately notified the appellant of the loss, and that it sent its adjuster to investigate it; that the latter stated to the respondent that he had fully investigated the loss, that he believed it was an honest one, but that the appellant desired to wait until the other companies having insurance upon the goods had acted, and that the appellant would do whatever the other companies

did; that on December 8 following, the respondent furnished the appellant the proof of loss, and demanded payment; that on June 29, 1907, the other companies settled with the respondent; that the respondent, relying upon the promise of the adjuster to do whatever the other companies did, refrained from commencing action until after the other companies had paid; that on July 1, 1907, the respondent advised the appellant that the other companies had paid, and demanded payment of the policy, which demand was refused on July 5 following. This action was commenced July 30, 1907, more than six months after the fire.

A general demurrer was interposed to the complaint, which being overruled, the appellant answered, joining issue upon the amount of the loss, notice at the time of the issuance of the policy of other insurance, and an extension of time in which to commence suit. The appellant pleaded three affirmative defenses: (1) That the policy sued upon provided, "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity . . . unless commenced within six months next after the fire;" that the loss occurred October 30, 1906, and that the suit was not commenced until July 30, 1907; (2) that the policy provided, "this entire policy, unless provided by agreement indorsed thereon or added thereto, shall be void if the party now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy;" that at the time the policy was issued, and continuously thereafter, and at the time of the fire, the respondent held three other policies of insurance on the property, aggregating $4,000; (3) that the policy stipulated that "this entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if any increase of hazard by additional exposures within one hundred feet or otherwise;" that after the issuance of the policy and prior to the fire, the hazard was increased by the erection of additional exposures to the property with-

in one hundred feet thereof, which fact was known to the respondent and not known to the appellant until after the fire. The reply admitted the three several provisions, alleged that the first two were waived as pleaded in the complaint, and denied that there was any increase of hazard after the issuance of the policy.

At the close of the case, the appellant moved for a directed verdict. It is conceded that, at the time the policy was issued, a rider was attached, containing the words "$2,000 other concurrent insurance permitted," and that at such time and continuously thereafter, and at the time the fire occurred, the respondent held three other policies of insurance on the property, aggregating $4,000.

The appellant first makes the point that the court erred in overruling the demurrer. This argument is predicated upon the assumption that the force of the clauses set forth in the first and second affirmative defenses is not broken by the averments in the complaint. This position, briefly restated, is, (1) that the suit not having been commenced within six months after the fire, the action is barred; (2) that a recovery is precluded on account of the existence of other policies of insurance at the time of the fire in excess of $2,000. We will notice these questions in the order stated.

The first objection does not go to the question of the original liability, but is a plea of the limitation of the time in which the suit is sustainable under the contract. We have held that the clause is a valid one. *State Ins. Co. v. Meesman*, 2 Wash. 459, 27 Pac. 77, 26 Am. St. 870; *Hill v. Phoenix Ins. Co.*, 14 Wash. 164, 44 Pac. 146. The respondent urges that the complaint alleges a waiver of this provision of the policy. Upon the demurrer we must accept it as true that the appellant's adjuster, a few days after the fire, stated to the respondent that he had investigated the loss, that he believed it was an honest one, but that the appellant desired that he should wait until the other companies having insurance upon the goods had acted, and that it would do what-

ever they did. It has been held that to adjust an unliquidated claim is "to determine what is due; to settle; to ascertain." 1 Am. & Eng. Ency. Law (2d ed.), 641. Or, as defined by Webster, it is: "To settle or bring to a satisfactory state, so that parties are agreed in the result." In *Ruthven v. American Fire Ins. Co.*, 102 Iowa 550, 71 N. W. 574, it was held that the direction to a party to adjust a loss included the power to waive formal proofs. In *Hall v. Union Cent. Life Ins. Co.*, 23 Wash. 610, 63 Pac. 505, 83 Am. St. 844, 51 L. R. A. 288, the action had not been commenced within the time fixed by the policy. An agent had told the beneficiary that the money would be paid if it was found that the premiums had been paid, and that it was best to wait until the party returned, to whom it was claimed the premiums had been paid and to whom, as the court found, the payments were made. This was held to constitute a waiver.

In *Sidebotham v. Merchants' Fire Ass'n.*, 41 Wash. 436, 83 Pac. 1028, the insured, the holder of an insurance policy, had not made sworn proofs of loss. The court held that, the insured having complied with the directions of the officers of the company in furnishing invoices and submitting his books for examination, and having been misled by them into the belief that he had done all that the company required of him in the way of furnishing proofs, and it appearing that he had been deceived in that respect, the presentation of sworn proofs of loss was waived. *Hill v. Phoenix Ins. Co.*, 14 Wash. 164, 44 Pac. 146, relied upon by the appellant, was by a divided court, and the rule announced by it as to the authority of an adjuster was not followed either in the *Hall* case or in the *Sidebotham* case. In *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841, the court considered the question of forfeiture arising from a failure to pay the premiums on a life policy. Discussing the question of a waiver of a forfeiture clause in the policy, at page 577, it is said:

"Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured

honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In the instant case, the delay in the commencement of the action was caused solely by the representations of the appellant's adjuster, and it has suffered no prejudice or injury therefrom. A corporation can act only through its agents, and they must be held to have such power as inheres in the duties they are assigned to perform. The appellant having clothed its adjuster with apparent authority to speak for it, and he having induced the respondent to delay the commencement of the action until the time limit fixed in the contract had expired, it will not now be heard to urge that he exceeded his authority, and invoke the bar. It is further urged in this behalf that suit was not commenced within a reasonable time after payment was refused. The jury under proper instructions resolved this question in favor of the respondent, and we cannot say, as a matter of law, that the time—twenty-five days—was not reasonable. The formal presentation of proof of loss, after the request of the adjuster to delay the commencement of the action, does not militate against the view announced in these cases.

It is next urged that the excess insurance alleged in the complaint renders it subject to demurrer. The respondent asserts that the appellant, knowing of the breach of the condition of the policy existing when it was issued and delivered, will be held to have waived the provision against other insurance. The appellant answers, saying that, even if this is true as to the printed condition, the rider, which was attached permitting other concurrent insurance to the extent of $2,000, discloses the real contract; that the appellant had a right to assume that the respondent would cancel the excess insurance. On the demurrer we must accept the averment as true, that the respondent disclosed to the appellant the fact that he

had $4,000 insurance on the property before the policy was written. Viewing the question from principle, the mind at once inquires, Did the appellant intend to deliver a void policy? What was the purpose of the policy, and what consideration did the appellant intend to give for the premium it received? We are persuaded that the juster and sounder rule is that the appellant, knowing of the existence and amount of other insurance on the property when it issued and delivered the policy, waived the condition under consideration. This rule has abundant support in the decided cases. *Mesterman v. Home Mut. Ins. Co.*, 5 Wash. 524, 32 Pac. 458, 34 Am. St. 877; *Hart v. Niagara Fire Ins. Co.*, 9 Wash. 620, 38 Pac. 213, 27 L. R. A. 86; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 60 N. W. 1095, 63 N. W. 241, 50 Am. St. 400, 28 L. R. A. 609; *German Ins. Co. v. Shader*, 68 Neb. 1, 93 N. W. 972, 60 L. R. A. 918; *Parsons, Rich & Co. v. Lane*, 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231. The fact that there was a rider attached permitting other concurrent insurance to the extent of $2,000, does not change the rule. It will be presumed that the appellant did not intend to issue a policy void in the beginning. The respondent urges that the words "other concurrent insurance" are ambiguous, and that parol evidence as to what the exact contract was is admissible. The view we take of the case makes it unnecessary to determine this question. The demurrer was properly overruled.

There was no written application for the policy. The respondent testified that negotiations for the policy were had with one J. W. Adkinson, in North Yakima; that the latter asked him how his insurance was, "and I told him I was going to have some more, and he wanted to know how much and I told him about how much, and he said he would take it for me. . . . I explained to him at the time what insurance I had and in what companies, and so he said he would make out a policy and forward it to me, and that was about all that was said at the time. . . . Well, I

just stated that I had $2,000 in the Home and $2,000 in the Aetna." He further testified that two or three days later he received the policy by mail, either from Adkinson or from Barney & Downs; that he noticed that it read, "$2,000 other concurrent insurance permitted," "and as I was carrying $4,000 I knew the policy wouldn't be any good that way, if it meant just the $2,000 altogether; so I wrote Mr. Adkinson and asked him about it. I didn't receive any reply for a day or two and happened to come up to town and brought the policy with me, and went to his house and handed it to him and called his attention to that part of it, and he looked it over and he says 'that means $2,000 additional; that is, $2,000 more than you are carrying.' He knew what I was carrying"; that thereupon he paid the premium. The policy was countersigned by Barney & Downs, the agents, and the respondent could not testify whether it was mailed to him by Adkinson or by Barney & Downs. This testimony is disputed by both Adkinson and Barney & Downs.

The appellant makes two contentions, (1) that there is no evidence tending to show that Adkinson was its agent, or that the amount of existing insurance was communicated to Barney & Downs; (2) that it was error to permit the respondent to testify that Adkinson explained that the rider meant $2,000 in excess of the $4,000 and the $2,500. Upon the first proposition, the testimony of the respondent discloses that he had no negotiations or conversations with any one other than Adkinson, before the delivery of the policy. Adkinson assumed to act as agent for a fire insurance company whose name was not disclosed until the delivery of the policy. The respondent did not know Barney & Downs in the transaction. If Barney & Downs wrote the insurance through Adkinson as their intermediary, it was for the jury to determine from all the facts and circumstances in the case the relation of the latter to them and the appellant. Agency may be, and often is, created by the conduct of the parties.

It is fundamental that facts known to an agent, when acting as such, are in law known to the principal, and it would be a fraud in law if an insurance company were allowed to deliver its policy through their agent and accept the premium with knowledge of the facts which, under its provisions, made it void *ab initio*, and thereafter assert its invalidity. *Parsons, Rich & Co. v. Lane, supra*, citing numerous authorities; *Fishbeck v. Phenix Ins. Co.*, 54 Cal. 422.

On the second point of the objection, the testimony was admissible for the purpose of showing that Adkinson had notice of the $4,000 insurance before the policy was accepted or paid for. The interpretation he gave the contract, in view of the knowledge he had of the facts, is the law's interpretation. Moreover, as we shall see, the appellant retained the premium after full knowledge of all the facts, and it must therefore be held to have asserted the validity of its contract.

There is, however, another principle of law which precludes the appellant from interposing this objection. The evidence discloses that it has received and retained the premium. True, this was not formally pleaded as an estoppel or waiver, but evidence of payment was admitted without objection, and the pleadings will be treated as amended so as to properly present the question.

"Clearly the defendant could not assert a right to the premium for valid insurance, and at the same time insist that the insurance had never been effected. By claiming and maintaining such a right, with full knowledge of all material circumstances, it unequivocally affirmed the validity of the insurance for the period covered by the premium, and definitely waived every objection on which its validity could be denied." *New Jersey Rubber Co. v. Commercial Union Assurance Co.*, 64 N. J. L. 580, 586.

See, also, *Parsons, Rich & Co. v. Lane, supra; Schreiber v. German-American Hail Ins. Co.*, 43 Minn. 367, 45 N. W. 708; *New York Life Ins. Co. v. Baker*, 83 Fed. 647; *Frasier v. New Zealand Ins. Co.*, 39 Ore. 342, 64 Pac. 814; *Elliott*

v. Lycoming County Mut. Ins. Co., 66 Pa. St. 22, 5 Am. Rep. 323; *German Insurance Co. v. Shader, supra.*

The policy provided that "no agent, adjuster, or other representative of this association except the secretary is authorized to waive proofs of loss or to admit or deny liability under this policy." This provision is invoked in aid of the six months' limitation clause in the policy. We have met this contention in considering the demurrer, and will not restate or recite the authorities. We will add, however, that parties competent to make such a contract may, as a rule, abrogate or modify it by a subsequent one entered into in any manner authorized by law. *Ruthven v. American Fire Ins. Co.*, 102 Iowa 550, 71 N. W. 574.

The denial of the motion for a directed verdict is assigned as error. Upon this question, in addition to the points already considered, it is urged that the evidence showed that, between the date of the delivery of the policy and the fire, two buildings were constructed by third parties within one hundred feet of the insured property, in contravention of the hazard provision of the policy. The policy, as we have seen, provided that it should be void if there is "any increase of hazard by additional exposures within one hundred feet or otherwise." The statement is made in the appellant's brief that the proof of loss—exhibit A—contains the respondent's sworn statement showing a violation of this provision. This exhibit is not in the record. The point is not well taken for two reasons; first, there is no evidence in the record showing a violation of the clause; second, the court instructed the jury thereon as follows:

"If you shall be convinced by a preponderance of the evidence that, after said policy was issued there was erected within one hundred feet from the property insured an additional exposure and that the same increased the hazard or risk or danger of such property being damaged by fire, then your verdict must be for defendant."

No exception was reserved to this instruction. For the

reasons stated, it is not necessary to consider the appellant's authorities under this head.

The court, in substance, instructed the jury that, if they were convinced by a preponderance of the evidence that Adkinson assumed to be a soliciting agent of defendant or of any undisclosed insurance company, and in that capacity solicited and obtained from plaintiff an application for insurance upon the property in question, either written or oral, and that plaintiff gave him such application believing him to be such agent, and gave it to him as such agent, and the defendant thereafter, with knowledge or notice that Adkinson had assumed so to act and had thereby obtained such application, issued the policy and received the premium from the plaintiff, intending that the policy should be received by the plaintiff in compliance with the application to Adkinson, and that the plaintiff did so receive it, then, for the purpose of this suit, the act of Adkinson in soliciting and receiving the application became in legal effect the act of the defendant; and if at the time of making such application the plaintiff informed Adkinson that there was already $4,000 other insurance on the property, the knowledge thus obtained by Adkinson is in law the knowledge of the defendant, and estops defendant from alleging that the policy is void on account of the other policies existing at the time the policy was issued. This is assigned as error, but as we have seen, it correctly announces the law.

The court instructed the jury: "You are the exclusive judges of all questions of fact and the weight to be given to any particular fact." This is assigned as error. The particular objection urged is that the jury are not the judges of "the weight to be given to any particular fact." The point made is that, when the jury has determined what a given fact is, the law as given by the court determines its weight. It is said *arguendo:*

"In the case at bar for instance, if from the testimony the jury found that the defendant company had no notice

of the excess insurance, the jury had no right to determine the weight to be given to that fact. That question is purely a question of law."

We think that the learned counsel has indulged in over-refinement. This is particularly true in the instant case, because immediately following the criticised words the court adds, "but the law it is your duty to accept from the court."

Finally, it is contended that the court erred in instructing the jury that the pleadings are not evidence in the case. It is urged that the instruction was misleading, as the jury might conclude that admissions in the pleadings could not be considered as evidence. The instruction as an entirety was:

"You will take with you the pleadings, that is the complaint and answer and the reply in this case, all exhibits in evidence, and, gentlemen, these pleadings; that is, the complaint and answer and reply, are not testimony in the case. They are not evidence in the cause. They are simply statements of what the parties on each side claim to be the facts, but not evidence of the facts, and the issues in the cause; that is, the issue of facts, you must determine under the instructions of the court from the evidence in the cause before you, and from the admissions of the parties respectively that have been laid before you or have been submitted to you."

The court had theretofore pointed out certain admissions in the pleadings. The instruction, read as an entirety, shows clearly that the charge that the pleadings were not evidence was limited to the issues joined, but that admissions in any form were evidence. We have not overlooked the fact that Adkinson, Barney, and Downs testified that the application for the policy was in the form of a letter addressed to Adkinson, wherein the respondent stated that he was then carrying $2,000 insurance; nor are we unmindful that they testified that Adkinson was then an employee in a clothing store and not connected in any way with the appellant or Barney & Downs. The letter, however, was not produced at the trial, but proof of its loss was offered. All the testi-

mony was submitted to the jury under proper instructions, and they having found for the respondent upon competent evidence, we cannot disturb the verdict. The veracity and credibility of the witnesses was for them to determine.

The judgment will therefore be affirmed.

RUDKIN, C. J., MORRIS, CHADWICK, and FULLERTON, JJ., concur.

[Nos. 7874, 8173. Department Two. September 29, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Rufus Merriam et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY, *Respondent*.

NORTH COAST RAILWAY COMPANY, *Respondent*, v. RUFUS MERRIAM *et al., Appellants*.[1]

APPEAL—REVIEW—PLEADINGS—AMENDMENTS — EMINENT DOMAIN. Objection to a petition in condemnation by a railroad company, in that it did not state that the petitioner was a common carrier, will not be considered on appeal, where the evidence showed that it was a common carrier authorized to exercise the power of eminent domain; since amendments will be considered as made to conform to the proofs.

EMINENT DOMAIN — PROCEEDINGS—EVIDENCE—ADMISSIBILITY—USE OF RAILROAD PROPERTY. In condemnation proceedings by a railroad company, evidence to show negotiations by the company to trade the land to a city for use as a street in exchange for the vacation of a city street is inadmissible, where a reasonable necessity for the condemnation was shown; since the railroad company could not condemn the land and dispose of it to the city for street purposes.

SAME—NECESSITY—ADJOINING STREETS. In condemnation proceedings by a railroad company, it is not necessary to first show that the city had granted a necessary right of way across adjoining streets.

SAME — DAMAGES — EVIDENCE — ADMISSIBILITY — PRICES PAID FOR LAND. In condemnation proceedings, evidence of the prices paid by the petitioner for property in the vicinity is inadmissible on the question of values.

[1]Reported in 104 Pac. 148.

SAME—INCREASE. In condemnation proceedings, evidence of a general increase in the value of property is inadmissible on the subject of values, when not limited to the vicinity of the property condemned.

SAME—PRICES PAID. In condemnation proceedings, evidence of the prices paid for the property one year previous to the condemnation is admissible on the subject of values.

TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions covered in the general charge.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered March 6, 1909, adjudging a public use and awarding damages in a proceeding to condemn property for railway purposes, after a trial before the court and a jury. Affirmed.

Cullen & Dudley, for relators.

Danson & Williams and *Hamblen & Gilbert*, for respondents.

MOUNT, J.—These two actions grow out of a condemnation proceeding, and were presented here together by one brief. In September, 1908, the North Coast Railway Company filed a petition in the superior court of Spokane county, seeking to condemn for railway purposes two lots, the property of Rufus Merriam and wife, in the city of Spokane. In December, 1908, the petition came on to be heard upon the preliminary question of the public use and the necessity for taking the property. The court, after a hearing, found that the contemplated use for which the property was sought was really a public use, and that the property was required and necessary for the purpose of the railway, and thereupon ordered the question of damages to be tried to a jury. This question was tried to a jury on January 13, 1909, and the value of the property taken was assessed at $3,375. Thereafter, on January 21, 1909, upon application of Merriam and wife, a writ of certiorari was issued out of this court to review alleged errors in the preliminary proceed-

ings. While that writ was pending here, final judgment for damages and a decree of condemnation were entered in the lower court on March 6, 1909. Thereupon Merriam and wife appealed from that final judgment.

It is contended by the appellants that the petition does not state facts sufficient to entitle the petitioner to condemn appellants' property. The petition does not state that the railway company was incorporated as a public service corporation or as a common carrier of freight and passengers. It states "that the petitioner is a corporation duly organized and existing under and by virtue of the laws of the state of Washington . . . and has power by the terms of its articles of incorporation, among other things, to construct, own, maintain, and operate a line of railroad from the city of Seattle in the state of Washington to Spokane; . . . that your petitioner is duly authorized to appropriate lands," etc. No demurrer was interposed to the petition, and no objection appears to have been made to the introduction of evidence at the time of the preliminary hearing. The articles of incorporation were received in evidence. These articles show that the corporation is a public service corporation, and a common carrier of freight and passengers for hire, and authorized to exercise the power of eminent domain; and the trial court so found. Thereafter, when the question of damages came on for hearing, a general objection was made to the introduction of evidence, upon the ground that the petition in condemnation was insufficient, which objection was overruled; and it is argued now, upon both branches of the case, that the judgment should be reversed for that reason. It is entirely immaterial now whether the petition was technically sufficient, because the record shows that the petitioner is a public service corporation under its charter, and under the statute is authorized to exercise the power of eminent domain. In such cases it is the duty of this court to determine the case upon the merits disregarding technicalities "and to consider all amend-

ments which could have been made as made." *Green v. Tidball*, 26 Wash. 338, 67 Pac. 84, 55 L. R. A. 879; *Peterson v. Barry*, 50 Wash. 361, 97 Pac. 239, and cases there cited. We try the case here upon the facts shown rather than upon the allegations of the petition.

It is next argued that the court erred in excluding evidence to the effect that officers of the petitioner had attempted to make an agreement with the city of Spokane to the effect that the city should vacate a street for the use of the petitioner, and in lieu of that street the city should accept the land now sought to be condemned and use the same for street purposes. Evidence of this character might perhaps tend to show that the land sought was not desired for railroad purposes, but it would not show that there was no necessity for the railway company to have the property for its use. It was shown that an offer of that kind had been made by the railway company to the city, but with the intention at that time of purchasing the property instead of condemning it. It is clear, we think, that the railway company is only authorized to condemn land for its own needs and use, and it is not authorized to condemn land for another or for some other use. *Seattle & Montana R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217.

"When the legislature delegates the power of eminent domain to an agent for the purpose of carrying out a special public work, such agent is not allowed to use the land taken for any other purpose than the one for which the power was granted." 10 Am. & Eng. Ency. Law (2d ed.), p. 1055.

The railway company, therefore, could not acquire the property by condemnation for use by the city. Nor could it convey the land acquired by condemnation for its own use for railroad purposes to the city or to any person for a different use. It was, therefore, immaterial what negotiations had taken place looking to that end, and we think the trial court did not err in refusing to go into this question of ex-

change more minutely than was done. The evidence fairly shows that the land was reasonably necessary for the uses of the condemning company. We shall not further consider the assignment of error relating to the question of necessity.

It is argued that, because the city has not granted a right of way to the condemning company across streets adjoining the property in question, therefore this property may not be condemned. This question was settled adversely to the same contention in *State ex rel. Harlan v. Centralia-Chehalis Elec. R. & P. Co.*, 42 Wash. 632, 85 Pac. 344, 7 L. R. A. (N. S.) 198, and *State ex rel. Hulme v. Grays Harbor & Puget Sound R. Co.*, 54 Wash. 530, 103 Pac. 809.

Upon the appeal from the award of damages, several errors are assigned which we shall briefly notice. It is claimed that the court erred in refusing evidence of prices paid by the petitioner for property in the same vicinity. In *Port Townsend Southern R. Co. v. Barbare*, 46 Wash. 275, 89 Pac. 710, we held such evidence inadmissible. The court also refused to permit evidence of a general increase in values in the city. If this had been confined to the vicinity of this property, it might have been material to show the value of these particular lots. Being unlimited, it was not error to refuse the evidence. It was shown that the appellants paid $2,000 for this property about a year previous to the condemnation. That fact, with the circumstances of the sale, was, we think, some evidence of value, and its admission therefore was not an error. The simple question for the jury to determine was the market value of the property at that time. The witnesses for the railroad company placed the value at about $3,000. Witnesses for appellants placed the value at from $6,000 to $7,300. The jury, after viewing the premises and hearing the evidence and the instructions of the court, found the value at $3,375. Appellants make no contention that there was any error in the instructions as given, but argue that two instructions which

were rejected should have been given. It is sufficient to say that the instructions given simply and completely covered the case, and that there was no error in refusing those not given.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 7972. Department Two. September 29, 1909.]

EDWARD F. QUINN, *Respondent*, v. REVIEW PUBLISHING COMPANY, *Appellant*.[1]

LIBEL AND SLANDER—PUBLICATIONS ACTIONABLE PER SE—GRAFT IN OFFICE. A newspaper publication falsely charging a city inspector of sidewalks with being part of a system of jobbery and graft in the management of city contracts, is libelous *per se*, since it imputes criminal offenses or moral delinquency in office tending to bring him into public hatred, contempt, or ridicule.

LIBEL AND SLANDER—DEFENSES—TRUTH. The truth of published statements concerning a public officer is a defense to an action for libel.

SAME—DEFENSES—TRUTH—EVIDENCE—SUFFICIENCY. The truth of a newspaper publication charging a city sidewalk inspector with graft and jobbery is not necessarily established by evidence that many sidewalks were poorly constructed and not up to the requirements of the contracts and that the inspector had been discharged for incompetency, the same being competent but not conclusive evidence.

SAME—WORDS AND PHRASES—"GRAFT." A charge of "graft" in a libelous publication implies a dishonest or corrupt transaction in office.

SAME—PRIVILEGED COMMUNICATIONS—FALSE ACCUSATION OF OFFICER. Where a newspaper charge of "graft" respecting a public officer is found to be false, it is without the rule of privilege, and actionable, although made in good faith.

[1]Reported in 104 Pac. 181.

SAME—MITIGATION—EVIDENCE—ADMISSIBILITY. A libelous publication in a newspaper is not mitigated or cured by another article in the same issue, and the latter is properly excluded.

APPEAL — REVIEW — HARMLESS ERROR — ADMISSION OF EVIDENCE. Error, if any, in permitting the plaintiff in libel to show his reputation for honesty, is cured where the court expressly withdrew such evidence and instructed the jury not to consider it.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered December 5, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for libel. Affirmed.

H. M. Stephens, for appellant.

Alex. M. Winston, for respondent.

MOUNT, J.—The respondent brought this action to recover damages upon two causes of action, for alleged libels published against him in the regular issues of the Spokesman-Review, on June 6 and 7, 1908. The action was tried to the court and a jury. A verdict was returned in favor of the plaintiff on the first cause of action for $999, and on the second cause for one dollar. The defendant has appealed.

It appears that the respondent was appointed inspector of sidewalks and cement and concrete work thereon for the city of Spokane, in May, 1904; that he continued as such inspector until July, 1905, when he became the chief inspector of such work until June 5, 1908, when he was discharged. It was respondent's duty to inspect all sidewalk work done under contracts with the city, and to see that the terms of such contracts were faithfully complied with by the contractors. While he was chief inspector he had several inspectors under him, and it was his duty to instruct these inspectors, and also to see that they performed their duty. On June 5, 1908, respondent was discharged for alleged incompetency, and the next day the Spokesman-Review published an article as follows:

"BLOW AT GRAFT AND JOBBERY.

"One by one facts are being disclosed by City Engineer Ralston which demonstrate that the management of the city

business under the old Daggett-Omo-Gill-McIntyre regime, now drawing slowly to an end, has been honeycombed with inefficiency, favoritism and graft. The domination of the board of public works by a majority of the members of the city council, and the presence until recently in the city engineer's office of an engineer who conducted that office with little regard for the efficiency in the service, together with the prevalence throughout of an iniquitous and corrupting system of political pull, have conspired to undermine the integrity of the business and of the city administration for the profit of favored contractors and others having business dealings with the city. Disclosures of the past few days have shown that appointments to places under the Omo board of public works have been made upon recommendation of members of the council with no regard for the fitness of the applicants; that specifications for contract work have been drawn carelessly in the interests of dishonest or careless contractors, that the system of inspection over street improvement contracts has consisted of one-half idle pretense and the other half deliberate favoritism, exerted in behalf of contractors who were influential with the political powers behind the foreman of inspectors, Ed. Quinn. City Engineer Ralston is to be heartily commended for his action in securing the removal of Foreman Quinn and thereby striking one effective blow at this system of graft and jobbery. Already the efforts of Mayor Moore to restore responsible government to the city hall in the interests of the taxpayers are beginning to bear fruit."

And on June 7, 1908, another article was published as follows:

"CAMERA CATCHES FALSE INSPECTORS.

"CIVILIAN SPIES ALSO AID IN DETECTING CITY SIDEWALK FRAUDS.

"A small army of volunteer civilian inspectors and a professional photographer were employed by City Engineer Ralston in procuring the evidence of the collusion of city inspectors through which cement contractors have been able to cheat the city in cement work by from 15 to 35 per cent of the amount of cement called for in their contracts and from 10 to 30 per cent of the actual cost of the work. As a result of the efficient employment of these agencies the engineer has made a case against some of the inspectors which is un-

shakable, and it was upon this evidence that he discharged a number of inspectors and procured the discharge of Foreman Quinn for inefficiency. Some of the disclosures obtained by the engineer prove the ingenuity of the contractors themselves, but others indicate that the skimping of cement work was accomplished through the frankly confessed negligence or collusion of the inspectors employed by the city to watch the contractors."

It is argued by the appellant that these articles are not libelous *per se*, but, if libelous, are true, and that therefore the trial court erred in denying the appellant's motions made at the close of respondent's evidence, and again at the close of all the evidence, for a directed verdict. In the case of *Wofford v. Meeks*, 129 Ala. 349, 30 South. 625, 87 Am. St. 66, 55 L. R. A. 214, the supreme court of Alabama quoted from *Iron Age Publishing Co. v. Cradup*, 85 Ala. 520, as follows:

"Generally, any false and malicious publication, when expressed in printing or writing or by signs or pictures, is a libel, which charges an offense punishable by indictment, or which tends to bring an individual into public hatred, contempt, or ridicule, or charges an act odious and disgraceful in society. This general definition may be said to include whatever tends to injure the character of an individual or blacken his reputation, or imputes fraud, dishonesty, or other moral turpitude or reflects shame or tends to put him without the pale of social intercourse."

And then said:

"This quotation clearly recognizes the principle that, if the words employed in the alleged libelous publication impute dishonesty or corruption to an individual, they are actionable *per se*,—a principle well established in other jurisdictions. 13 Am. & Eng. Ency. Law, 295, 296, and note 3. So too, it is libelous to impute to any one holding office that he has been guilty of improper conduct in office, or has been actuated by wicked, corrupt, or selfish motives. Newell, Defamation, Slander & Libel, p. 69."

Under this definition, which is no doubt correct, the publications in this case were clearly libelous *per se*. They

charge that the management of the city business under the old regime has been honeycombed with inefficiency, favoritism, and graft; that the domination of the board of public works by a majority of the city council and the presence of an engineer, together with the prevalence throughout of an iniquitous and corrupting system of political pull, have conspired to undermine the integrity of business and of the city administration for the profit of favored contractors; that the system of inspection over street improvement contracts has consisted of one-half idle pretense and the other half deliberate favoritism, exerted in behalf of contractors who are influential with political powers behind the foreman of inspection Ed. Quinn. City Engineer Ralston is to be commended for his action in securing the removal of Foreman Quinn, and thereby striking an effective blow at this system of graft and jobbery.

It is plain that this article and the one published the next day, upon which the second cause of action is based, clearly charged the respondent with being part of the system of jobbery and graft in the management of city contracts, and the main one through whom such jobbery and graft were accomplished; and it was no doubt intended thereby to charge, and did charge, the respondent with being guilty of improper conduct in office, and that he had been actuated by wicked, corrupt and selfish motives. The articles were therefore libelous *per se*. If these charges were true, the newspaper was privileged to publish them.

" 'But the prevailing rule is that charges imputing a criminal offense or moral delinquency to a public officer, cannot, if false, be privileged, though made in good faith, and this though the charge relates to an act of the officer in the discharge of his official duties.' " *Byrne v. Funk*, 38 Wash. 506, 80 Pac. 772.

If untrue, the newspaper must be responsible for the damages done in its publication. *Bourreseau v. Detroit Evening Journal Co.*, 63 Mich. 425, 30 N. W. 376, 6 Am. St.

320. The truth of the accusations made will, of course, be a defense. *Leghorn v. Review Publishing Co.*, 31 Wash. 627, 72 Pac. 485; *McClure v. Review Publishing Co.*, 38 Wash. 160, 80 Pac. 303.

Appellant insists that the evidence shows that the articles were true, or substantially so, and that, therefore, it was the duty of the court to direct a verdict in favor of the appellant. This seems to have been the principal issue of fact, if not the only issue in the case, and we think it was fairly shown that in many instances sidewalks were poorly constructed and that they were possibly not as thick as the contract called for, and also that the concrete mixture in some cases was not in the proportion of one of cement to three of sand and five of gravel or crushed rock, as provided for in the contracts, and also that the respondent was discharged for incompetency as city inspector. But these facts, being true, did not necessarily show graft and jobbery as charged in the published articles. Graft, as defined by the Century Dictionary and Encyclopedia, Vol. 3, p. 2591, means:

"Dishonest gain acquired by private or secret practice or corrupt agreement or connivance, especially in a position of trust, as by offering or accepting bribes."

The trial court correctly instructed the jury that graft "is a dishonest transaction in relation to public or official acts, and a further definition of the word graft is as commonly used to designate an advantage which one person by reason of his peculiar position or superior influence or trust acquires from another." *Craig v. Warren*, 99 Minn. 246, 109 N. W. 231; *State v. Sheridan*, 14 Idaho 222, 93 Pac. 656, 15 L. R. A. (N. S.) 497.

While the facts shown in this case, as stated above, were all circumstances proper to be shown as tending to prove dishonesty or corruption, they do not necessarily prove that the respondent was dishonest or profited by reason thereof, or that he was himself guilty of graft or jobbery, or that he intentionally permitted contractors to job or graft the

city. These facts may show that respondent was incompetent, but they are not conclusive of dishonesty. The most that may be said of such facts is that they are circumstances from which the jury might have found dishonesty or graft and jobbery. They were, therefore, for the jury, and the jury having found that they do not constitute graft and jobbery, that finding is conclusive here.

It is also claimed that the court erred in excluding a certain article which was published in the same issue of the paper as the one where the libel complained of was published. This article did not in any way mitigate or attempt to cure the libel published, and was therefore properly excluded. If it had attempted to do so, it would not have been admissible.

Exhibit No. 27 appears to be a report by respondent of certain defective work done. It tends to show that respondent was attempting, at least, to do his duty. No good reason is offered for its introduction. We have already referred to the question of privileged publications and need not discuss this assignment further. The charge of graft and jobbery having been found false by the jury, it follows that the articles were without the rule of privileged publication, and that such charges were unfair comments. If the court erred in permitting respondent to prove his reputation for honesty, that error was cured, because the court expressly withdrew such evidence and instructed the jury not to consider it.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8024. Department Two. September 29, 1909.]

E. A. PATRICK, *Appellant*, v. C. E. WATSON, *Respondent*.[1]

SALES—DELIVERY—NUMBER OF ANIMALS—EVIDENCE—SUFFICIENCY. The evidence is insufficient to establish that plaintiff purchased and paid for 150 head of horses, only 85 of which were delivered, where it appears that he purchased defendant's farm and stock at a lump sum of $47,500, and without any segregation of the price as to any separate article, the horses being described in the contract as all horses of a certain brand on the farm "or wherever they may be found," although plaintiff testified that he figured the horses at $10,000, the defendant to deliver them at the farm and guaranteeing 150 head, and where it appears that there was no such guarantee in the written contract and no statement of any definite number, that only 66 head were on the farm, and that plaintiff hired men to find the others on the range.

SALES—WRITTEN CONTRACT—ORAL REPRESENTATIONS—ESTIMATE OR GUARANTEE. Where the written contract for the sale of all horses of a certain brand on a farm, "or wherever they may be found," did not specify any number, it is conclusive that the same was for an indefinite number, and representations on negotiating a sale that there were 150 to 175 head is a mere estimate and not a guarantee.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 31, 1908, dismissing, at the close of the evidence, an action to recover the purchase price of live stock, after a trial on the merits before the court without a jury. Affirmed.

John C. Kleber and *Robertson & Rosenhaupt*, for appellant.

Merritt, Oswald & Merritt, for respondent.

MOUNT, J.—Appellant brought this action to recover from respondent $4,332.90, the purchase price of sixty-five head of horses alleged to have been purchased and paid for, but never delivered by respondent to appellant. The case was tried to the court without a jury. At the close of all the evidence, the court found that the plaintiff had not es-

[1]Reported in 104 Pac. 144.

tablished the allegations of his complaint, and dismissed the action. The plaintiff has appealed.

It appears that in October, 1907, the appellant agreed to, and did, purchase from the respondent a farm and all farming implements and machinery and all horses, cattle, and live stock, with certain specified exceptions, owned by respondent, for the sum of $47,500. It is claimed by appellant that the purchase price of the horses was $10,000, and that respondent guaranteed that there were as many as one hundred and fifty head of horses, and that only eighty-five head were delivered. At the time the sale was made, a written contract was entered into, the part thereof referring to the live stock being as follows:

"Also said first party conveys to said second party all horses, cattle and other live stock and all interests therein owned by said first parties, situated and located either upon said land or wherever they may be found, and also all rights and title of said first party to the following stock, brands W A and xx and all stock bearing said brands which have not heretofore been sold or disposed of by said first party herein, saving and excepting however four (4) work horses, one (1) driving team, and one (1) cow which have heretofore been selected by mutual agreement of the parties."

The appellant testified that he figured the horses at $10,000, and that he paid that sum for the horses. We are satisfied, however, that, when the sale was finally concluded, it was upon the basis of a lump sum of $47,500 for the whole property, without any segregation of the price as to any separate article. This point, however, is of no special importance in the case. The appellant also testified that it was his understanding that the horses were to be delivered at the farm, and that the respondent guaranteed that there were at least one hundred and fifty head of them; but the written contract contains the final agreement of the parties, and no such guarantee is stated therein. The contract contains no statement of any definite number of horses. It states that the respondent "conveys all horses

. . . and all interests therein . . . situated and located either upon said land or wherever they may be found."

It is clear that the delivery of the bill of sale was the delivery of all of the horses included therein "wherever they may be found." This included those upon the farm as well as those upon the range; and, as indicating that the appellant so understood the contract upon the question of delivery, he testified that sixty-six head of horses were upon the farm, while the others were upon the range; that he hired men to find the other horses for him, but that these men were able to find only nineteen head upon the range, making eighty-five head that were delivered to him. It was not shown that there were no more horses upon the range. The record clearly shows that neither of the parties knew just how many head of horses there were. In negotiating the sale, the respondent stated that there were between one hundred and fifty and one hundred and seventy-five head scattered upon the range, but this was merely an estimate. If the parties intended that there should be a guarantee of one hundred and fifty head, it would have been an easy matter to have stated so in the written contract. Not having been stated, the contract is conclusive upon that subject. *Buckeye Buggy Co. v. Montana Stables*, 43 Wash. 49, 85 Pac. 1077, 117 Am. St. 1032. The trial court was therefore right in its conclusion that the contract was for an indefinite number of horses, and that the delivery of the contract was a delivery of all horses belonging to respondent wherever they may be found.

The judgment is therefore affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8071. Department Two. September 29, 1909.]

JOHN WEIDENSTEINER, *Appellant*, v. JOHN MALLY *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES—LICENSES—REVOCATION. Permission to divert the waters of a creek on defendants' land by a ditch for domestic and irrigation purposes, the defendants refusing to either sell or convey a permanent right of way, is a license merely, revocable at will.

SAME—ADVERSE POSSESSION—PRESCRIPTIVE RIGHT—REPUDIATION OF LICENSE. The use of a ditch to convey waters for the statutory period, given by a license, will not ripen into a prescriptive right, where there was no repudiation of the license with notice thereof to the licensor.

SAME—APPROPRIATION. Waters of a creek already appropriated are not subject to appropriation under the statute.

SAME—ADVERSE POSSESSION—HOSTILE CLAIM—LICENSE. An attempt to make a statutory appropriation of water, used under a license, does not amount to an adverse claim, where it was not so intended, being merely to prevent appropriation by others, and the licensor had no notice of any adverse claim.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered February 1, 1909, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to restrain the diversion of the waters of a ditch. Affirmed.

Robertson, Miller & Rosenhaupt, for appellant.

Judson & Rochford, for respondents.

MOUNT, J.—In the year 1890, the appellant and the respondents settled and filed government homesteads upon adjoining claims, of one hundred and sixty acres each, in Stevens county. A small creek, known as Grouse creek, flowed through the respondents' land. This creek did not touch the land of the appellant. Government patents were

[1]Reported in 104 Pac. 143.

issued to the parties in 1897 and 1898. In the year 1902, after the parties had settled and filed upon their land, the appellant requested permission from the respondents to take water out of Grouse creek and convey the same across the land of the respondents to his own land, for domestic purposes. This permission was granted by respondents orally, and thereupon the appellant dug a ditch across the respondents' land and has maintained the same ever since.

At the time this permission was granted, the appellant offered to pay for the right of way, and requested respondents to convey such right of way in writing, but respondents refused to sell the same or to make any conveyance thereof to the appellant. Thereafter the appellant used the ditch for carrying water for domestic uses and for irrigation, each year increasing the amount of irrigation until, at the time this case was tried, he had about fifteen acres of land in cultivation and under irrigation. Some time after appellant began to use the water for irrigation, he filed a claim of appropriation of certain waters in Grouse creek, describing the intake on appellant's land and the course of his proposed ditch substantially upon the line of the ditch then in use as above stated. The respondents during all this time were also using a part of the water of Grouse creek upon their own land for irrigation and domestic uses.

In the year 1906, the respondents constructed a sawmill upon their own land and upon this creek, and also constructed a dam across the creek above the intake of appellant's ditch, and thus diverted the water from appellant's ditch, and used the same for the purpose of operating the mill. Thereafter the appellant brought this action to restrain respondents from diverting the water from the ditch, used by the appellant for domestic and irrigating purposes. Upon the trial the court concluded that the use of the water and the ditch by the appellant across the respondents' land was a mere permissive use, the license for which could be revoked at any time, and dismissed the action.

Plaintiff appeals, and argues that he is entitled to a prescriptive right by adverse user, of the ditch and the water which flows therein, for more than the statutory period. The evidence in the case, however, is clear that the right to construct the ditch and use the water from Grouse creek was a mere permissive right, granted by the respondents to appellant, and that respondents refused either to sell or convey a permanent right. Such right or license was revocable at the will of respondents, and could not be enforced thereafter by the appellant. *Hathaway v. Yakima Water L. & P. Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847; *Prentice v. McKay* (Mont.), 98 Pac. 1081. The permissive use of the ditch or the water across respondents' land, no matter how long continued, could not give title by prescription to the appellant. 22 Am. & Eng. Ency. Law (2d ed.), 1196; Wiel, Water Rights, § 248, p. 379.

Under the circumstances of this case, before there could be any adverse holding, it was necessary for the appellant to have repudiated the license and brought knowledge of such repudiation home to the respondents. 22 Am. & Eng. Ency. Law (2d ed.), p. 1198. We find nothing in the record to show that the license given by the respondents to appellant was ever repudiated by the appellant. It is true, that the appellant at one time attempted to file an appropriation of certain water under the statute, but such appropriation was clearly not effective under the rule in *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107, because the water was already appropriated by the respondents. See, also, *Atkinson v. Washington Irrigation Co.*, 44 Wash. 75, 86 Pac. 1123, 120 Am. St. 978.

If this attempted appropriation could be considered as tending to show an adverse claim, there is evidence in the record to show that it was not so intended at the time, but was for the purpose only of preventing an appropriation by

other persons who might subsequently claim a portion of the water. At any rate, the respondent had no notice of any adverse claim against his rights. We are of the opinion, therefore, that the right given to appellant was a mere license, revocable at will, and that there is no sufficient evidence of any adverse holding on the part of appellant to sustain the claim of rights by prescription.

The judgment of the lower court was right, and it is affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8083. Department Two. September 29, 1909.]

LYDIA R. ADLEY *et al.*, *Appellants*, v. EDWARD PLETCHER, *Administrator etc.*, *Respondent.*[1]

TRUSTS—RESULTING TRUST—GIFT—ADVANCEMENT—EVIDENCE—SUFFICIENCY. It appears that property purchased by a parent in the name of her daughter, with whom she lived, was intended as a gift or advancement to the daughter, without any trust, except during the lifetime of the owner, where it appears that after her daughter's death, she procured her daughter's husband to execute a quitclaim deed to her daughter's daughter, and was satisfied, although he inserted a condition in the deed not desired by her.

SAME—PRESUMPTIONS. The purchase of property by a parent in the name of a child raises a presumption of a gift, and rebuts the presumption of a resulting trust.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered February 16, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to declare a trust in real property. Affirmed.

Samuel R. Stern, for appellants.

Swanson & Ripley, for respondent.

[1]Reported in 104 Pac. 167.

MOUNT, J.—This action was brought by the appellants to have certain real estate in Spokane county, claimed by the respondent, declared to be trust property for the benefit of appellants. The cause was tried to the court without a jury. The court found that the property described was a gift from Mrs. R. M. Eaton to her daughter Mary Pletcher, was not held in trust, and for that reason dismissed the action. The plaintiffs appeal, and allege that the court erred in not finding that the property was held by Mary Pletcher during her lifetime and thereafter by her daughter Laura E. Pletcher during her lifetime, in trust for Mrs. R. M. Eaton and her heirs.

The facts are as follows: Mrs. R. M. Eaton was the mother of the appellants and also of Mary Pletcher. The latter was married to respondent, Edward Pletcher, in the year 1885, in the territory of Dakota. A child, Laura E. Pletcher, was born to Mary Pletcher and her husband. Prior to the birth of this child, Mr. and Mrs. Pletcher separated but were never divorced. Two or three years after the marriage, Mrs. Pletcher and her mother, Mrs. R. M. Eaton, were living together in Dakota. They left there and came to Spokane in this state, where they continued to live together. Mrs. Eaton owned a farm in Dakota. The title of this farm stood in the name of her daughter Mrs. Pletcher, for the reason, as stated by Mrs. Eaton, that if anything happened to her Mrs. Pletcher would have the property. After coming to Spokane, the farm in Dakota was sold, and a house and lot was purchased in the city of Spokane from the proceeds of the sale of the Dakota farm. This house and lot is the property in controversy in this action. The title thereto was taken in the name of Mrs. Pletcher. Mr. Pletcher remained in Dakota and contributed nothing to the support of his wife and daughter, though they communicated back and forth. Mary Pletcher died intestate on March 21, 1907. Thereafter her mother, Mrs. Eaton, expressed regret that she had not taken the title of the house and lot in her own

name and disposed of the same by will. She desired the property to go to her granddaughter, Laura E. Pletcher, and that her father should have no interest in it.

After the death of Mrs. Pletcher, Mrs. Eaton and her granddaughter, Laura E. Pletcher, requested Mr. Pletcher to make a quitclaim deed of his interest in the property to his daughter, Laura E. Pletcher, and a form of deed was sent to him for that purpose. He executed the deed, but inserted therein this provision: "In the event that said grantee shall leave a child or children, then such child or children shall inherit all of said premises." Mrs. Eaton was satisfied with this deed, and it was placed of record in Spokane county on September 26, 1907. Thereafter Laura E. Pletcher collected the rent for the property. Mrs. R. M. Eaton died intestate on January 5, 1908, and Laura E. Pletcher died intestate on February 12, 1908. Subsequently Mr. Pletcher came to this state and was appointed administrator of his daughter's estate and took possession of the property, and this action followed.

A careful reading of the evidence in this case convinces us that, if there was any trust at all, it was one in favor of Mrs. Eaton only during her lifetime, for it clearly appears, from both her words and her acts, that she intended that her daughter Mrs. Pletcher should have the property after her death, and when her daughter died first it then appears that she wanted her granddaughter Laura to have the property. She was active in procuring a quitclaim deed from Mr. Pletcher to his daughter, and when this quitclaim deed was executed with the condition which she at least did not desire, after reflection she was satisfied with the condition and so expressed herself. This seems to be conclusive of her intention that the property was not held in trust for her, but was a gift or advancement to her daughter and subsequently to her granddaughter. The rule is stated in Perry on Trusts, Vol. 1 (4th ed.), page 168, as follows:

"If a purchaser of an estate pays the consideration money and takes the title in the name of a stranger, the presump-

tion is that he intended some benefit for himself, and a resulting trust arises for him; but if the purchaser takes the conveyance in the name of a wife or child, or the person, for whom he is under some natural, moral or legal obligation to provide, the presumption of a resulting trust is rebutted and the contrary presumption arises, that the purchase and conveyance were intended to be regarded *prima facie* as a settlement upon the nominal purchaser, grantee; and if the payer of the money claims a resulting trust he must rebut this presumption by proper evidence."

And in 15 Am. & Eng. Ency. Law (2d ed.), p. 1161, as follows:

"Where a purchase is made in the name of a child, and the purchase money is paid by the parent, the presumption arises that the purchase was intended as an advancement to the child and rebuts the presumption of a resulting trust to the parent."

And on page 1163 of the same volume:

"A purchase by a mother who takes title in her child's name has been held in England not to give rise to the presumption of an advancement, but the contrary rule seems to obtain in the United States."

We are satisfied that, under the rule of law stated and under the facts shown, the trial court was right in his conclusion. The judgment is therefore affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8090. Department Two. September 29, 1909.]

C. TWITCHELL *et al.*, *Appellants*, v. THE CITY OF SPOKANE *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES—PUBLIC SUPPLY—WATER RATES—PROFITS—MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—SEPARATE FUNDS. A city owning its own water works has a right to fix reasonable water rates which will result in some profit, and will not be enjoined from transferring the profits on the system from the water fund to the general fund, in the absence of any statute requiring the water fund to be kept for a special purpose.

SAME—WATER RATES—TAXES. Water rates paid by consumers for city service are in no sense taxes.

SAME—FREE WATER. A city owning its water system may furnish water for municipal and charitable purposes free.

SAME—REASONABLENESS OF RATES. On the question of the reasonableness of water rates, the cost of extending water mains and depreciation may be considered.

SAME—REVIEW. City authorities have a discretion in fixing water rates which will not be reviewed unless the rate is excessive.

SAME—REASONABLENESS OF RATES. A water rate of 80 cents a month for a five-room house with bath, toilet, and lavatory, and $2.80 per year for a lawn 60x135 feet, is reasonable.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 18, 1909, after a trial on the merits before the court without a jury, dismissing an action for an injunction. Affirmed.

William S. Lewis and *Delbert Twitchell*, for appellants.

L. R. Hamblen, *F. D. Allen*, and *Harry Rhodes*, for respondents.

MOUNT, J.—The appellants brought this action to obtain a reduction of water rates, and to restrain alleged wrongful use of water revenues by the city of Spokane. The cause was tried to the court without a jury, and the action was dismissed. The plaintiffs appeal.

[1]Reported in 104 Pac. 150.

It appears that the city of Spokane owns and operates a water system for supplying the city and the inhabitants thereof with water for domestic purposes. The total cost and appraised value of the plant at about the time the action was begun was $2,338,749.35. Of this sum $827,154.38 has been paid from revenues derived from the water system. The balance, $1,511,591.97, was outstanding bonds and city warrants bearing interest. The total revenue from the water system for the year 1907 was $291,775.78. The expenditures amounted to $232,248.42, leaving a net balance of about $59,000. The expenditures included $68,200 for interest on bonds and warrants, $18,000 for redemption of warrants, and $86,030.90 for extension of water mains. Water was furnished by the city to itself, and also to several charitable institutions, free of charge. The rate charged consumers was eighty cents per month for a five-room house with bath, toilet, and lavatory, and for a lawn sixty by one hundred and thirty-five feet, $2.80 per year.

It is contended by the appellant, (1) that the transfer of certain moneys from the water fund to the general fund is illegal, and that such money should be applied to the payment of outstanding warrants against the water fund; (2) that the rates charged amount to an excessive tax on water consumers; (3) that the rates fixed are excessive; and (4) that the city has no right to sell water at a profit, or to furnish water free for municipal or charitable purposes.

The evidence shows that certain funds were transferred from the water account to the general fund. It is not clear that the funds so transferred were used for general purposes, but we assume that they were so used. We find nothing in the record to indicate that such money was required to be kept in a special fund, or that there were any outstanding overdue warrants to which it could have been applied. The matured obligations against the water fund all seem to have been met when due. When there is no requirement by statute or otherwise that money coming into the city treasury

shall be kept in a special fund and applied to a particular purpose, it is proper, of course, to place it in the general fund, and to use it for general city purposes. If we understand counsel correctly, it is not claimed that any money derived from the sale of water or from the water system, which was necessary for the maintenance and expenses of the system, was transferred to the general fund, but it is claimed that the profits of the system, after the expenses were paid, were placed in the general fund, and that this was illegal; in other words, that the city is not authorized to sell water at such a rate as to make a profit. This is the point upon which the case of the appellants depends. It is, no doubt, true that courts will prevent the illegal disposition of public moneys, and that cities furnishing water to its inhabitants may not charge more than a reasonable rate, as argued by appellants. But we think there can be no doubt that such city is authorized to make such a rate as to yield a reasonable profit. By statute, Pierce's Code, § 3643 (Laws 1905, ch. 59, § 1), it is provided that cities may own and operate water works and furnish to its citizens water, with full power to regulate and control the use, disposition, and price thereof. Section 57 of the city charter of Spokane confers the same authority. In vol. 1, Farnham, Water and Water Rights, at page 855, § 162, it is said:

"When a municipal corporation owns its own plant for the supply of water to its inhabitants, the property is held for the common benefit, and every inhabitant has a right to the benefit of it on reasonable terms. Therefore, although the municipality has a right to fix the terms by which the water will be supplied, and to establish the rates which shall be paid for it, the right must be exercised in a reasonable manner, so that the rates shall be reasonably proportionate to the service rendered. The municipality, however, is not required to limit the rate to the actual expenses of furnishing the water, but may fix a rate which will result in some profit to it, which it may use to meet its other public needs."

It is claimed that the rate charged amounts to an excessive tax on the community. But water rates are not taxes. The consumer pays for a commodity which is furnished for his comfort and use. The rule is stated in 30 Am. & Eng. Ency. Law (2d ed.), p. 422, as follows:

"Water rates paid by consumers are in no sense taxes, but are nothing more than the price paid for water as a commodity. The obligation to pay for the use of water rests either on express or implied contract on the part of the consumer to make compensation for water which he has applied for and received."

See, also, *Wagner v. Rock Island*, 146 Ill. 139, 34 N. E. 545, 21 L. R. A. 519.

The right of the city to furnish water for municipal and charitable purposes free can hardly be doubted. 30 Am. & Eng. Ency. Law (2d ed.), p. 435; *Sewickley Water Works Com'rs v. Sewickley Borough*, 159 Pa. St. 194, 28 Atl. 169; *Detroit Board of Water Commissioners v. Detroit Citizens' Street R. Co.*, 131 Mich. 1, 90 N. W. 657, 91 N. W. 171. The city owns the water and controls it. If the supply is greater than the demand, there is no good reason why it should account for water used in that way. The mere fact that a profit is made from the other consumers does not necessarily show that the rate is excessive.

Appellants argue that the cost of extending water mains and depreciation should not be considered in fixing the rate to consumers. No absolute rule for fixing a rate at which water must be sold by municipalities to its citizens is cited. We think, however, that the items stated are proper to be considered; but, assuming that they are not, this would be only a circumstance tending to show that the rate was excessive. It would not necessarily be conclusive. Some reasonable discretion must abide in the officers whose duty it is to fix such rates, and unless the courts can say from all the circumstances that the rate fixed is an excessive one and disproportionate to the service rendered, the judgment of the

officers fixing the rate must stand. The rate charged by the city seems reasonable for the service rendered.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 7945. Department Two. September 29, 1909.]

CHARLES SCHOENING, *Respondent*, v. LILA YOUNG, *Appellant*.[1]

MUNICIPAL CORPORATIONS—STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for injuries to plaintiff's horse and buggy in a collision with defendant's automobile, where the evidence is conflicting as to whether plaintiff was guilty of contributory negligence in driving on the left side of the street near a turn, findings for the plaintiff are supported by evidence that the automobile struck the left side of the buggy and horse before it had turned straight with the street.

NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence is properly overruled where it appears that the evidence was known but not produced because its necessity was not anticipated.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 5, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for damages sustained through a collision. Affirmed.

Charles Petrovitsky, for appellant.

Guie & Guie, for respondent.

PER CURIAM.—The appellant, driving an automobile, and the respondent, driving a horse hitched to a buggy, collided near the junction of Rainier avenue and Charleston street,

[1]Reported in 104 Pac. 132.

in Georgetown, King county, Washington, and the respondent, conceiving that the appellant was at fault, brought this action against her to recover the damages suffered by his property by reason of the collision. Appellant took issue with the allegations of the respondent, contending that the respondent was at fault. A trial was had on the issues made, before the court sitting without a jury, resulting in findings and a judgment in favor of the respondent for the sum of $264. This appeal was taken therefrom.

The evidence shows that the collision occurred on the evening of December 3, 1907, shortly after it became dark. The appellant approached the junction of the avenues in her automobile, traveling on Rainier avenue at a speed of about ten miles per hour; while the respondent approached the junction from Charleston street, traveling at the gait at which a carriage horse ordinarily trots. The appellant reached the junction first, and, without slackening the speed of the automobile, started to turn into Charleston street and collided with the respondent before the automobile had completed the turn.

The parties do not agree as to the exact place in the street the collision took place. The appellant contends, and her evidence in part at least tended to support her, that the automobile turned immediately on reaching the intersection of the street, keeping all the while on the right side of the center of the street, and that the machine was well to the right of the center when the collision occurred. On the other hand, the respondent insists that the appellant, on approaching the corner, was traveling at too great a speed to make the turn directly, and crossed to the left of the center of the street before completing the turn, colliding with respondent's horse and buggy on that side of the street. The point is material on the question of contributory negligence on the part of the respondent, for if it be true that the appellant was negligent, that she approached the junction of the street and attempted to make the turn at too great a speed under

the conditions as they then existed, the respondent was likewise guilty of negligence contributing to his injuries if he approached the junction traveling at a trot on the side of the street he could expect persons obeying the statutes and the rules of the road to be traveling upon. But if he was upon the proper side of the street, there is nothing in the record that indicates negligence on his part. On this question we are not inclined to disturb the findings of the trial court. While, as we say, the evidence is in conflict, and each side seemingly was supported by about an equal number of witnesses, the concomitant circumstances, although meagerly perhaps, support respondent's contention rather than the appellant.

When the automobile approached the crossing it was traveling, according to the chauffeur, some five feet distant from the curb. It struck the respondent's horse on the left hip and the buggy on the left front wheel, and this after the automobile had proceeded along Charleston street some fifteen feet and before it had turned straight with the street. These circumstances support the respondent's account of the accident, rather than the account of appellant; for if the horse and buggy had been approaching on the appellant's side of the street the collision could hardly have taken place in the manner here described; and that it did take place in this manner there is no dispute in the evidence.

The appellant further contends that the court erred in overruling her motion for a new trial. This motion was based on the ground of newly discovered evidence. But a perusal of the affidavits filed in support of the motion makes it clear that the evidence thought to be newly discovered was not unknown to the appellant at the time of the trial; or, at least, it was not so far hidden that it could not have been found by the exercise of reasonable diligence. This, indeed, is hardly denied by the appellant, but she contends that she did not anticipate the turn the action would take and the necessity for the evidence that she now seeks to produce, and

did not produce it for that reason. But manifestly this is not a sufficient cause for which to grant a new trial.

The judgment is affirmed.

[No. 8056. Department Two. September 29, 1909.]

EMMA PRINGLE, *Respondent*, v. T. N. PRINGLE, *Appellant*.[1]

APPEAL—DECISIONS REVIEWABLE—FINAL ORDERS. An order requiring the payment of suit money as a condition precedent to the hearing of a petition to vacate a fraudulent judgment of divorce, in default of which the opposing party might move for a dismissal of the petition, is appealable, under Bal. Code, § 6500, authorizing appeals from final judgments or orders which in effect determine the action or prevent a final judgment therein.

APPEAL—REVIEW—DISCRETION. The discretion of the court in imposing terms as a condition precedent to the vacation of a default judgment, is not an arbitrary one that may not be reviewed on appeal.

DIVORCE—JUDGMENT—VACATION—IMPOSITION OF TERMS. Where a default judgment of divorce was secured by a wife through fraud, and all the property was awarded to her and in her possession, and it does not appear that the husband has any means, it is error to require the husband to pay $50 suit money as a condition precedent to the prosecution of a petition to vacate the decree.

Appeal from an order of the superior court for Mason county, Mitchell, J., entered January 23, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to vacate a decree of divorce. Reversed.

W. H. Abel and *O. M. Nelson*, for appellant.

E. N. Steele, for respondent.

PER CURIAM.—We are met at the threshold of this case with a motion to dismiss the appeal. It is urged that the order from which the appeal is prosecuted is not final. It is

[1]Reported in 104 Pac. 135.

true that no order of dismissal was entered by the court below, but the order made (from which we will hereafter quote) was effectual to conclude the rights of the appellant. The order does not involve the merits of the controversy so as to be reviewable on appeal from a final judgment. The finality of an order should be determined by its legal effect rather than by reference to its form, and when so considered the order of the court is well within the provisions of Bal. Code, § 6500 (P. C. § 1048).

Respondent began an action in Mason county against appellant, and obtained a decree of divorce upon constructive service. The proceedings appear to be regular. A return that appellant could not be found in either Mason or Chehalis county was made by the respective sheriffs of those counties. A trial was had and a decree rendered, in which it was adjudged that respondent was entitled to a divorce and all of the property belonging to the community, as well as the custody of the children. Within the statutory period of time allowed for the vacation of judgments by petition, appellant petitioned the court for an order vacating the decree and asking leave to defend the action. The basis of his petition rested upon the asserted fact that he had at all times during the pendency of the action resided in Chehalis county; that his place of residence and postoffice address were well known to respondent; that such proceedings were had in the principal case that the court was misled and imposed upon so that a fraud was perpetrated upon appellant and upon the court.

This petition was met by respondent with a motion for an order allowing attorney's fees and suit money. This motion was supported by affidavits showing her present financial inability to resist the petition. While the transcript shows the technical regularity of the service, the paramount fact that respondent at all times knew of the whereabouts and place of residence of appellant was not denied by her. The affidavits filed in support of the motion were met by a counter

affidavit of appellant showing that respondent was in possession of all of the property belonging to the community, both real and personal, while he was without means and ability to comply with the demands of respondent. The motion being heard, the court made an order denying the rights of appellant to be heard unless he met the terms imposed by the court. The material parts of the order are as follows:

"That the defendant be and he is hereby required to pay into the above entitled court for the use and benefit of the plaintiff, before he is permitted to proceed further with his petition to open up the judgment and decree herein, and before the plaintiff is required to make her showing in resistance thereto, the sum of $50 as an attorney's fee, and the further sum of $25 as suit money. The said money to be paid into the above entitled court by the said defendant within 20 days from this date, and if not so paid then the said petition of the defendant may be refused and dismissed upon motion of the plaintiff. This order not to interfere with or prevent such further order as the court may adjudge."

The position of respondent is that the imposition of terms is a matter resting in the sound discretion of the trial court, and she further sustains her contention by reference to Bal. Code, § 5722 (P. C. § 4636), wherein it is provided that the court may make a proper allowance for suit money and attorney's fees in behalf of a wife seeking a divorce. It is the general rule that the imposition of terms, as a condition precedent to the vacation of a judgment, is a matter within the sound discretion of the trial court; but the rule is not absolute, nor is the discretion arbitrary so as to prevent a review in a proper proceeding. While at common law and under the accepted practice of our courts, the court has the right to impose terms, it has never been held to be the law that terms that were oppressive or unjust could be imposed at the will of the court, nor is the right of a wife to suit money and attorney's fees an absolute right. While the section of the statute relied upon seems to have been drawn prior to the

enactment of the community property law, it must be construed with reference to it. Its object was to insure the wife an efficient preparation of her case and maintenance pending the trial. If she be otherwise provided for or have property in her own right, there can be no reason for the assertion of the right to an allowance out of the separate property of her husband, or to put upon him the burden of maintaining the suit. In the case at bar, the record shows that all of the property of the community, whatever it may be, is in the custody of the respondent, and there is nothing to show that appellant has any means whatever. All orders imposing terms should be made in furtherance of justice. *Prima facie* the order of the court was unwarranted and arbitrary.

This case is not to be measured by the general rules applying where a party is relieved as an act of grace or favor from a situation arising from laches or inattention. The nature of the attack, as well as the character of the case, invites investigation on the part of the court, and all orders, although warranted by facts which may be subsequently developed, should be postponed until the jurisdiction of the court is determined. In the recent case of *Holcomb v. Holcomb*, 53 Wash. 611, 102 Pac. 653, we held that financial inability would excuse the payment of alimony. It would seem that in like principle a party should not be barred of the right to have the legality of a judgment inquired into because of inability to meet the payment of terms assessed as suit money and attorney's fees. But the principle involved strikes deeper than would appear upon first impression. The decree was not merely irregular but, if the facts asserted by appellant be true, was a fraud upon the court. Upon suggestion of this, a court should promptly make such inquiry and finding as will protect and preserve the integrity and sanctity of its decrees, and this without reference to the relative rights and duties of the parties. Then, too, this is a divorce case in which the public has an interest, and this alone, coupled with a challenge to the jurisdiction of the

court, affords sufficient grounds for hearing the complaint of appellant without terms and unconditionally. *Graham v. Graham*, 54 Wash. 70, 102 Pac. 891. The supreme court of California in the case of *Cottrell v. Cottrell*, 83 Cal. 457, 23 Pac. 531, in passing upon a question like unto the one now before us, adopted the following apt statement of the law from the case of *McBlain v. McBlain*, 77 Cal. 507, 20 Pac. 61:

"The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; the policy and letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters."

The first question for the court to determine is, not whether appellant has a cause of action, but whether a fraud has been practiced upon the court. Bal. Code, § 5159 (P. C. § 1041).

We express no opinion upon the merits, but reverse and remand the case with instructions to the lower court to inquire into the regularity of its former proceedings, and thereupon to make such order and disposition of the case as the facts may warrant.

[No. 7904. Department Two. September 29, 1909.]

THE STATE OF WASHINGTON, *Appellant*, v. M. J. SWAN, *Respondent*.[1]

FALSE PRETENSES—OBTAINING MONEY FOR CHARITY. Obtaining a donation of money as a charity under false representations is within Bal. Code, § 7165, making it an offense to obtain money under false pretenses; the act being within the spirit and intent of the law, which makes no exception.

CRIMINAL LAW—DEFENSES—CRIMES UNDER VARIOUS ACTS. It is no defense to a prosecution for obtaining a donation of money by false pretenses, in violation of Bal. Code, § 7165, that the same act is punishable under the vagrancy act, *id.*, § 6724.

[1]Reported in 104 Pac. 145.

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered April 27, 1908, upon sustaining a demurrer to the information, dismissing a prosecution for the crime of obtaining money under false pretenses. Reversed.

C. R. Hovey and *H. W. Hale*, for appellant.

Crow, J.—Defendant was charged, under Bal. Code, § 7165 (P. C. § 1662), with the crime of obtaining money under false pretenses. The charging part of the information is as follows:

"He, the said M. J. Swan, did in the county of Kittitas and state of Washington, on or about the fifteenth day of January one thousand nine hundred and eight, unlawfully, feloniously, falsely, fraudulently, and designedly and with intent to defraud R. L. McDonald, obtain from said R. L. McDonald a sum of money, to wit, fifty cents, lawful money of the United States of America, the property of the said R. L. McDonald, by then and there unlawfully, wilfully, feloniously, fraudulently and designedly pretending to said R. L. McDonald that he, the said M. J. Swan and his wife and children were on their way to Iowa and had lost a horse needed by him to convey them thither and that he was without means to obtain another horse; he, the said defendant, making said statements and representations as an appeal for aid; whereas in truth and in fact the said defendant had not suffered the loss of any horse as he the said M. J. Swan well knew; that by means of said false pretenses and representations the said R. L. McDonald delivered to the said M. J. Swan the sum of money aforesaid."

To this information a demurrer was sustained by the trial court, and the state has appealed.

No brief has been filed by respondent, but from appellant's brief it is made to appear that it was the theory of the trial court that if one obtained money from another as a charity, although the inducement was a false representation, he could not be charged with the crime of obtaining money by false

pretenses. Reference to the section of the code under which the charge against respondent is made will disclose the fact that there is no limitation or exception made in favor of the one who by any false pretense obtains a thing of value from another. The only question in the case—if, indeed, it may be called a question—is whether the act charged is a false pretense within the meaning of the law. There is nothing in the act before us to indicate that it was not within the intent of the law to punish a false pretense of poverty and want, nor is it made to appear that the act charged is not within the spirit of the law. It is only when the act is clearly at variance with the legislative intent, or when, although within the letter, it would do violence to the spirit of the law, or violate some constitutional right, that courts are warranted in writing exceptions to a general statute, for it must be admitted that it is within the power of the legislature to define as a crime any actionable wrong.

Upon principle, also, it would seem that the act charged is a false pretense within the meaning of the law. By it respondent obtained that which was the property of another. Had he appealed to the cupidity, avarice, or business judgment of the complaining witness he would have been guilty of the crime charged. Then, why is he not likewise guilty if he has appealed to the charitable impulses of his victim? The same object has been obtained. He has obtained the property of another. Mr. Bishop has defined a false pretense as "such a fraudulent representation of an existing fact or a past fact by one who knows it not to be true as is adapted to induce the person to whom it is made to part with something of value." Bishop, New Crim. Law, § 415. In 12 Am. & Eng. Ency. Law (2d ed.), p. 845, the following definition will be found:

"A false representation made by a person as to his own or another's necessitous condition, by means of which gifts of money or property are obtained in charity, is a false pretense."

This court, in the case of *State v. Phelps*, 41 Wash. 470, 84 Pac. 24, has said that any pretense which deceives the person defrauded is sufficient to sustain an indictment or information.

The exact question now before us, as well as the case (*People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303) upon which the trial judge seems to have rested his opinion, was considered by the supreme court of Wisconsin in the case of *Baker v. State*, 120 Wis. 135, 97 N. W. 566. Answering the contention that the statute had no application to the act of inducing, by fraudulent representation of a fact, a donation of money as a charity, the court said:

"This contention has support from *People v. Clough*, 17 Wend. 351, 31 Am. Dec. 303, which seems not to have been questioned or expressly reaffirmed on this point in New York. The conclusion was reached in that case on the strength of the recitation which preceded the English statute (30 Geo. II, c. 24) which was the prototype of most of the statutes in this country; the latter, however, not retaining the preamble. That preamble recited as the wrong to be reached by the statute the obtaining by evil-disposed persons of divers sums of money or merchandise, 'to the great injury of industrious families and to the manifest prejudice of trade and credit.' From this the New York court argued that such trifling sums as people were ever induced to give to mendicants or for charity were not likely to cause great injury to industrious families, or to prejudice trade and credit. The English courts, in construing their own statute, have never so limited it. *Reg. v. Hensler*, 11 Cox Cr. Ca. 570; *Reg. v. Jones*, Temp. & M. 270. Nor has any other court, so far as we, or apparently the counsel, have ascertained, adopted the view of the New York court, which has been repudiated by many of them. *Com. v. Whitcomb*, 107 Mass. 486; *State v. Matthews*, 91 N. C. 635; *Strong v. State*, 86 Ind. 208, 44 Am. Rep. 292; *State v. Styner*, 154 Ind. 131, 56 N. E. 98; 2 Wharton's Cr. Law, § 1153; Bishop's Cr. Law, § 467."

The doctrine in *People v. Clough* was never reaffirmed in the state of New York, and its rule was distinctly repudiated by the statute of 1851. In a dissenting opinion rendered in

the case of *McCord v. People*, 46 N. Y. 470, Justice Peckham says of the *Clough* case:

"The supreme court of this state, I say it with great respect, once put an exception in our statute not placed there by the legislature; that a false pretense, whereby charity was obtained, was not within the meaning of the statute, though plainly within its language. It seems to be settled the other way in *England R. v. Jones* (T. & M. 270). . . . The recital preceding the English statute that evil disposed persons had obtained goods by false pretenses, 'to the great injury of industrious families, and to the manifest prejudice of trade and credit,' was referred to as showing that only trade and commerce were sought to be protected, and their invasion only were within the denunciation or penalty of the act, though this recital was never adopted here. . . . This made it necessary for the legislature to strike this exception out again, and they did so by an act passed in 1851. (Laws of 1851, p. 268.) Now the act in terms applied to all, the virtuous and the vicious, to 'industrious,' and to idle families alike."

The common law covered only those frauds which were perpetrated by the use of a false token or writing, or effectuated through the instrumentality of a conspiracy to cheat or defraud. It was the intent and object of the statute, therefore, to embrace all false pretenses, whether of act, word, or deed, and this comprehends any verbal pretense or representation, fraudulently uttered, sufficient to induce another to part with his property. It will thus be seen that the *Clough* case is not supported by either reason or authority.

It is said in appellant's brief that the trial judge was further induced to hold the information bad because the acts charged had been defined in the vagrancy statute, Bal. Code, § 6724 (P. C. § 1889). With this conclusion we are unable to agree; but if it were so, it would not follow that respondent could not be charged as he is. A person might be answerable under one of two statutes. The only consequence would be that conviction under the one would be a bar to prosecution under the other.

"It is no defense to an indictment under one statute that a defendant might also be punished under another." *In re Converse*, 137 U. S. 624, 11 Sup. Ct. 191, 34 L. Ed. 796.

For the reasons herein assigned, the judgment of the lower court is reversed, and this cause remanded with instructions to overrule the demurrer and to hear and determine the facts charged in the information.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 7323. *En Banc.* September 29, 1909.]

THOMAS WELL, *Respondent*, v. MORAN BROS. COMPANY *et al.*, *Appellants.*[1]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—CHOICE OF WAYS. The rule that there can be no recovery by a servant who chose a dangerous way, when there was a safe one open to him, assumes that he had knowledge of the danger, and does not apply where there were two ways of ascending a turret in a battleship, both free from danger when the hoists were not in operation, and he, without warning, accidentally chose one, not knowing that it was in operation.

SAME—EVIDENCE—QUESTION FOR JURY. In such a case, where the plaintiff testified that he did not know the hoist was in operation, and that when operated it made such noise that any one could hear it, and he neither saw nor heard it, the question whether it was in operation when he started is for the jury.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $4,000 for injuries resulting in a fractured jaw, the loss of an ear, disfigurement, and impaired physical condition, is not excessive.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 9, 1907, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in the construction of a battleship. Affirmed.

Wright & Kelleher and *Harold Preston*, for appellants.

Casey & Casey (*Milo A. Root*, of counsel), for respondent.

[1]Reported in 104 Pac. 172.

FULLERTON, J.—The respondent brought this action against the appellants to recover damages for personal injuries received by him while in the appellants' employ as a machinist's helper, working on the battleship Nebraska. The jury at the trial in the court below returned a verdict for him in the sum of $4,000, for which sum judgment was entered in his favor. This appeal is from the judgment so entered.

The accident to the respondent occurred in the forward turret of the battleship. The turret rests on the protective deck and is operated by motors placed thereon. It is circular in form, and inside of it an opening extends from the turret pan, the floor directly below the floor on which the guns are placed, down through it and through the ship proper to a floor known as the twelve-inch handling room. Surrounding this space are several floors or galleries, which, commencing at the bottom, are called in the record by the following names: The twelve-inch handling room, the eight-inch handling room, the protective deck, the gallery above the protective deck, the turret pan, and the top of the turret, this last being the floor on which the heavy guns are placed. In the center of this opening is placed a framework running from the floor of the twelve-inch handling room to the gun floor, to which framework are attached the tracks for the ammunition hoists. These tracks are perpendicular until they reach near the turret pan, when they separate, the one swerving towards the breech of the right-hand gun and the other towards the left, and pass through the floor of the turret pan by separate openings. The several floors or galleries above mentioned are connected by ladders. A ladder also extends from the twelve-inch handling room up the center frame between the tracks of the ammunition hoists to the level of the gallery immediately above the protective deck, and is connected with the gallery by means of a grating extending from the top of the ladder to the gallery floor. From the gallery floor last mentioned, ladders run up through the

openings in the turret pan through which the ammunition hoists pass. These openings are opposite each other, and while the ladders passing through them may be used with safety when the ammunition hoists are not in operation, they are extremely dangerous when the hoists are being used, owing to the narrowness of the passage through the turret pan.

The accident occurred in the afternoon. At that time the respondent had been working in and around the turret for a day and a half, doing such work as he was directed to do either by the machinist of whom he was the helper or the foreman in charge. The turret was then practically completed, and its various parts were being tested before the government inspectors. Either the day before or on the morning of the day of the accident, the turret itself had been tested for mobility, and in the test the motors operating it had been used. Oil had been used on the motors rather freely, and had run down and accumulated on the floor around them. The foreman, observing this, directed the respondent to go and get some waste and wipe up the oil. In obedience to this order, the respondent started to climb up through the turret to the upper deck where he expected to find some waste, and had reached and stepped out onto the foot of the left-hand ladder leading to the turret pan, when the ammunition hoist descended and struck him on the head, causing the injury for which he sues.

The witnesses do not agree as to the place the respondent was standing when the order to get the waste was given. The respondent thinks he was then on the protective deck, while the foreman testifies he was on the floor below the protective deck, the floor of the eight-inch handling room. The point is material only as it indicates the probable route of the respondent in going for the waste. If he was on the floor of the protective deck, he probably took the ladder between the ammunition hoists to a place on a level with the gallery above the protective deck, and crossed the grating above

mentioned onto the floor of the gallery. This course would bring him directly in contact with the tracks of the ammunition hoists, so that if either hoist had been in operation he could scarcely have failed to note the fact. If, however, he was already on the protective deck, he probably took a side ladder to the gallery, in which event he would have been some feet farther from the tracks of the hoists and correspondingly less likely to have noticed whether either of them was then in operation.

According to the appellants' evidence, a test of the left ammunition hoist was being made at the time the respondent was struck, and that this test had then continued for about ten minutes, during which time the hoist had made a trip from the floor of the twelve-inch handling room to the breech of the gun and back, the distance between the two points being thirty-seven and one-half feet, at least once in each minute. It was shown that the hoist was of considerable weight, and, running on tracks similar to a car, as it did, made a noise so loud and distinct that no one near it could fail to hear and observe it. The respondent testified that if the hoist was in operation at the time of the injury he did not know it; saying, in answer to direct questions put to him by appellants' counsel, that he neither saw nor heard it running.

The respondent was not directed to go to any particular place to get the waste, nor was it shown where the waste was kept. He was expected, apparently, to find it where he could, and to search the vessel until he did find it. In going to the top of the turret, however, he had a choice of ways. He could have gone to the gallery above the protective deck by the route he did take, and then have passed into the turret pan by way of the right-hand opening instead of the left, or he could have gone to another part of the ship and ascended on ways there provided, either of which would have afforded him a safe route.

The appellants moved for a nonsuit at the conclusion of the respondent's case in chief, and at the conclusion of the en-

tire case, challenged the sufficiency of the evidence to justify a verdict for the respondent. The motion and challenge were overruled, and the court's ruling in so doing constitute the principal errors assigned. It is the appellants' contention that the respondent was guilty of contributory negligence in that he had a choice of ways equally available to him by which to reach the upper deck of the vessel, only one of which was dangerous, and that he voluntarily chose the dangerous way. In support of the contention *Lewis v. Simpson*, 3 Wash. 641, 29 Pac. 207; *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Bundy v. Union Iron Works*, 46 Wash. 231, 89 Pac. 545, and kindred cases announcing a doctrine similar to that announced in these cases, are cited. These cases do maintain the principle that when a servant has a choice of ways of doing his work, the one fraught with peril and the other safe, and voluntarily adopts the dangerous way, he is guilty of contributory negligence. But these cases are all based on the assumption that the servant has knowledge of the conditions surrounding his work, and chooses the dangerous way, or dangerous method of doing the work, with the extra hazard in view. It was not so with the respondent in the case at bar, unless we are to ignore entirely his own testimony. His evidence is to the effect that he did not know that the hoist was in operation at the time he attempted to pass through the opening in the turret pan; that he had seen it operated several times before this particular day, and that when it was operated it made such a noise that any one near it would observe it, but that he neither saw nor heard it on this occasion. If this be true he was not guilty of negligence. The ways were alike and equally free from danger when the hoists were not in use, and he had no more reason to suspect danger from the one way than from the others. Such being the case, his choice of the dangerous way was accidental rather than voluntary, and he is not to be held negligent because of an accidental selection of the

dangerous way. He stood in the position of a servant who had been directed to work in a dangerous place without being warned of the danger. He did not assume the risk of injury. That risk was on the master because of its failure to warn him of the danger to be encountered in taking that particular way. *Ramm v. Hewitt-Lea Lumber Co.*, 49 Wash. 263, 94 Pac. 1081.

The appellants urge, however, that it was proved beyond question that the hoist was in operation, and that this court should not permit the respondent to assert that he had no knowledge of the fact. But this court cannot assume that it was established beyond question that this hoist was in operation while the respondent was ascending the ladders to the opening at which he was injured. That fact depends upon the memory of witnesses, and is contradicted in the record by the respondent's evidence. The question was one, therefore, for the jury and trial court, and since they found against the contention, this court has no rightful warrant to interfere with the finding.

It is contended that the award of damages was excessive. The accident fractured the respondent's jaw and caused the loss of his left ear, leaving him disfigured, and in a worse physical condition than he was formerly. We think that the sum of $4,000 not so disproportionate to the injury as to warrant us in interfering with the verdict. The judgment will stand affirmed.

RUDKIN, C. J., GOSE, MOUNT, CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8033. Department One. September 30, 1909.]

NORTHERN PACIFIC RAILWAY COMPANY, *Appellant*, v. PIERCE COUNTY *et al.*, *Respondents*.[1]

TAXATION—EXCESSIVE—ASSESSMENTS—EVIDENCE—APPEAL—REVIEW. An assessment cannot be disturbed for mere overvaluation, in the absence of fraud or capriciousness, and clear evidence to overcome the liberal presumption that the assessor performed his duty in a proper manner; and a finding sustaining an assessment will not be disturbed upon conflicting evidence of values, in the absence of fraud.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered January 25, 1909, upon findings in favor of the defendants, dismissing an action to restrain the collection of taxes, after a trial on the merits before the court without a jury. Affirmed.

Geo. T. Reid and *J. W. Quick*, for appellant.

J. L. McMurray and *H. G. Rowland*, for respondents.

FULLERTON, J.—The appellant, Northern Pacific Railway Company, brought this action against Pierce county and its treasurer to restrain the collection of certain taxes levied by the respondent county on lands designated upon the assessment rolls as blocks 67 to 71 inclusive, less the right of way of the Northern Pacific Railway Company.

In its complaint the appellant alleges, that it is the owner of the blocks mentioned, and that the same are partly occupied by railway tracks of which it is also the owner; that in the year 1907, as required by the laws of the state of Washington, it returned to the assessor of Pierce county a list of the main and side tracks owned by it in Pierce county, in which was included the tracks on the blocks before mentioned, and that such tracks, together with the land occupied by them, were duly listed by the assessor as part of the company's right of way, and a tax duly levied thereon, which tax

[1]Reported in 104 Pac. 178.

the company paid; that in placing a value for taxation on the portions of the blocks not embraced within the right of way, the assessor inadvertently, through mistake and oversight, omitted to deduct from the value of the within blocks the value of that portion occupied by tracks, but in making such assessment fixed the value on the portion not occupied by tracks, at a sum equal to the value intended to be placed upon the entire blocks; that by reason of the inadvertence, mistake and oversight of the assessor there had been in fact a double assessment of the company's property before described; that its property had been assessed for the sum of $781,400, whereas its actual value was but $156,273; that the valuation placed on the property by the assessor was grossly in excess of the actual value, and grossly in excess of the valuation placed by the assessor on like property similarly situated, and that the tax levied thereon constitutes an unfair, unequal, and grossly excessive tax; that the total tax charged against the property mentioned is the sum of $28,208.54, whereas, the proper amount chargeable is the sum of $5,641.45, which total sum with interest and penalties the company had tendered to the assessor and stood at all times ready and willing to pay. It thereupon prayed that the county be required to accept the sum of $5,641.45, with interest and penalties, in lieu of all taxes against the property described, and cancel all additional charges, and that the property be declared free and clear of all liens on account of taxes.

The county and its treasurer answered the complaint, denying that the appellant's property had been doubly assessed or assessed in a sum grossly in excess of its value, or overassessed in any manner, and pleading affirmatively that the property had been valued for taxation at the sums named in the complaint, in the year 1906 for the biennial period provided by statute, and a tax levied thereon for the year 1906, which tax the appellant had paid; that no change was made in the valuation of the property for 1907, and the

valuation complained of as excessive in that year was the valuation accepted by the appellant for the preceding year. On the issues thus made a trial was had, which resulted in a judgment of dismissal of the appellant's action.

There was no direct evidence of inadvertence, mistake or oversight on the part of the assessor, nor was there any direct evidence tending to show that a double assessment had been made of a part of the property described. On the contrary, the assessor, when put upon the witness stand and interrogated concerning the method pursued in making the particular assessment, testified that he had no independent recollection of the matter at all, and the assessment roll, when produced, showed that the assessment did not include that part of the several blocks covered by the railway tracks and assessed as a part of the appellant's right of way.

The appellant, however, sought to prove its case by showing that the property was grossly overvalued as compared with its real value and the assessed value of like property of another owned in the same situation. To that end it showed that the property of the Puget Sound Flouring Mill Company, which owned 1.8 acres in the north part of block 71, was assessed at $32,400, or at the rate of $18,000 per acre, while its own part of the block, consisting of 2.24 acres, was assessed at $56,300, or at the rate of $25,133 per acre. It showed furthermore, that its holdings in these several blocks, outside of its right of way, had been assessed at amounts ranging from $25,133 per acre in block 71, to something over $39,000 dollars per acre in block 67, whereas its tax commissioner testified that a fair average value of the entire tract was $10,000 per acre. It appeared also that the assessor purported to assess the land at only sixty per cent of its actual value.

On the other hand, the county put in evidence testimony to show that the blocks were chiefly valuable because of their situation, covering as they do the principal water frontage of the city of Tacoma, and being desirable for docks, wharves,

and warehouse sites. It also put upon the stand four witnesses who qualified themselves to testify as to the value of the particular tracts. One, a Mr. Hellar, placed a valuation on the property substantially in accord with that appearing on the assessment rolls; another, a Mr. Miller, valued the property at from $50,000 to $80,000 per acre; and the two others, a Mr. Mettler and a Mr. Railsback, placed a valuation thereon of from $75,000 to $100,000 per acre.

The circumstances under which the courts are authorized to interfere with an assessment of property made by the assessing officers has frequently been a subject for consideration by this court. In *Templeton v. Pierce County*, 25 Wash. 377, 65 Pac. 553, the decisions rendered prior to that time were summarized, and the principles governing the action of the court were restated. It was there said that fraud, capriciousness, or want of the exercise of an honest judgment on the part of the assessing officers was ground for interfering with the action of the officers, if the assessment made was grossly disproportionate to the value of the property assessed, or unequal when compared with the assessments on other property of like kind; but that mere overvaluation, unless the excess was so gross as to impute fraud on the part of the assessing officer, was not a ground for interference; that the assessor in placing valuations upon property acts in a *quasi* judicial capacity, and the law presumes that he has performed his duty in a proper manner; that this presumption is liberal, and the evidence to overthrow it must be clear. The same principles are enunciated in subsequent cases. *Miller v. Pierce County*, 28 Wash. 110, 68 Pac. 358; *Henderson v. Pierce County*, 37 Wash. 201, 79 Pac. 617; *Dickson v. Kittitas County*, 42 Wash. 429, 84 Pac. 855.

Tested by these principles, there would seem to be no cause for interference with the assessment complained of here. There is no direct evidence of fraud, capriciousness, or want of an exercise of an honest judgment on the part of the assessor, and the presumption of fraud that might arise

from the fact that the railroad's property is assessed at higher valuation than the similar tract owned by the Puget Sound Flouring Mills Company is not conclusive of overvaluation, in the light of the evidence as to values given by the witnesses. This evidence would rather indicate that the property of the flouring mill company was underassessed, than that the railroad's property was overassessed. And since the question is one to be determined from the weight of the evidence, we feel that inasmuch as the trial judge, who had the witnesses before him and knew their standing as men of capacity and judgment, saw fit to allow the assessment to stand, we have no warrant to overturn it.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

[No. 7866. Department Two. September 30, 1909.]

VANCOUVER WATER WORKS COMPANY, *Appellant*, v. CLARKE COUNTY *et al.*, *Respondents*.[1]

TAXATION—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. In an action to reduce an assessment upon lands containing springs used for a city water supply, it is no evidence of overvaluation that farming lands in the vicinity were assessed at a less rate, or that other springs were assessed less, in the absence of proof that they were in demand for a similar use.

SAME—FRANCHISE. The assessment of a city water company's franchise is not shown to be excessive from the fact that the franchises of telephone and light companies were less, there being no evidence to form a basis of comparison.

SAME—PRESUMPTION TO SUPPORT. An assessor acts in a *quasi* judicial capacity, and it requires clear evidence to overcome the presumption that he acted in a proper manner in fixing valuations.

Appeal from a judgment of the superior court for Clarke county, Linn, J., entered May 25, 1908, upon findings in favor of the defendants, after a trial on the merits before the

[1]Reported in 104 Pac. 180.

court without a jury, in an action to obtain a reduction of taxes assessed against a water works system. Affirmed.

Rands & Connor and *A. L. Miller*, for appellant.

Jas. P. Stapleton, for respondents.

PER CURIAM.—The appellant owns and operates a system of water works with which it supplies the city of Vancouver, Washington, and the inhabitants thereof, with water. During the year 1905-6, its property was assessed at a rate which it deemed greater proportionally than that at which surrounding, contiguous, and like property in Clarke county was assessed. It appeared before the board of equalization and protested against the assessment, but succeeded in securing only a partial reduction. It thereupon began the present action in the superior court of Clarke county to secure a further reduction. Judgment went against it in that court, and it has appealed the case here.

The evidence on which the appellant relies is somewhat meager. From the testimony of the manager of the appellant company, who was the only witness called, it can be gathered that the company owns two tracts of land lying some five miles distant from the city of Vancouver, the one containing 9.27 acres and the other 11 acres; that on these tracts are located the springs which furnish the supply of water which the company distributes to its consumers. It further appears that the assessor did not assess the appellant's plant as one complete whole, but as if composed of several distinct parts, valuing the tracts containing the springs at $5,000 each, and the franchise which the appellant has from the city of Vancouver at $10,000.

It also appeared that the mains and pipes through which water was carried and distributed, and certain other property of the company, were valued separately, but at what figure does not appear in the record; nor does it appear what the assessment was upon the property as a whole; nor

is there any evidence in the record as to the value of the appellant's plant, other than what might be inferred from the fact that it was bonded for $100,000, had a gross income for the year 1906 of something over $20,000, and that the operating expenses for the same year were $5,142.48. The appellant did introduce evidence, however, tending to show that other lands in the vicinity of its own tracts were assessed at from fourteen to thirty-two dollars per acre, two or three of which contained springs which the witness stated were of a capacity equal to those belonging to the appellant, and so situated that they could be used to supply the city of Vancouver with water. It was also shown that a light and power company and a telephone company had franchises within the city of Vancouver, and that these franchises were assessed at $3,000 and $5,000 respectively, as against assessments of $10,000 on the appellant's franchise. There was no definite evidence as to the value of these properties, nor as to their gross or net earnings, nor their relative value as compared with the value of appellant's property.

The appellant's counsel, in his argument in this court, treats the several parts of the appellant's property, into which the assessor divided them for assessment purposes, as separate entities, and argues that the foregoing evidence shows that the land containing the springs, and the franchises granted by the city to lay pipes and mains along its streets, are grossly overvalued when compared with the assessment of property of like kind and character belonging to other owners. But it has seemed to us that the appellant has fallen far short of establishing these facts. Whether its property as a whole is overassessed there is, of course, no evidence at all, since neither the amount of its assessment nor the value of its property is shown. It is no evidence of overassessment to show that land in the vicinity of appellant's land is assessed for a less amount than is the appellant's land, without showing that they are alike in character and are in demand for the uses to which the appellant's land is devoted.

For this reason land valuable for ordinary farming purposes cannot be justly compared for assessment purposes with land containing springs which are used to supply a city with water. It is, therefore, no evidence at all that appellant's lands are overvalued to show that farming lands surrounding it are assessed at a much less valuation. The appellant's lands do not derive their value from their use for farming purposes; neither are they being so used. Nor is it evidence that they are overassessed to compare the amount at which they are valued with the assessment put by the assessor upon lands containing springs, without showing that the springs are in demand for a use like or similar to that for which appellant's springs are used; but of this there was no evidence at all. The witness merely said that the springs could be used for furnishing water to Vancouver; not that there was any demand for their use for that purpose, or for any other that made them of value. This, we think, too remote to afford a basis of comparison.

With reference to the franchise, the evidence was even less satisfactory. The witness testifying gave no figures to support his estimates of the values of the franchises of the telephone company and the light and power company, and to reduce the assessment on the franchise of the appellant company would be simply to substitute the judgment of the witness as to the value of the several franchises for that of the assessor. This we are not warranted in doing. The assessor in placing valuations upon property for the purpose of assessment acts in a *quasi* judicial capacity, and the law presumes that he has done his duty in a proper manner and, as we said on another occasion, this presumption is liberal, and is not to be overturned except by clear and convincing evidence. *Northern Pac. R. Co. v. Pierce County, ante* p. 108, 104 Pac. 178.

Whether, therefore, there was an overassessment in the instant case is not established by the record, and the judgment will stand affirmed.

[No. 7752. *En Banc.* September 30, 1909.]

In re MERCER STREET, SEATTLE.

THE CITY OF SEATTLE, *Respondent*, v. O. B. LITTELL *et al.*, *Appellants*.[1]

EMINENT DOMAIN—DAMAGES—APPEAL—REVIEW. The verdict of a jury, awarding damages in a condemnation case, will not be disturbed on appeal when supported by any competent evidence and the jury viewed the premises.

SAME—STREETS—PUBLIC USE AND NECESSITY. When the city council, by due ordinance, directed the improvement of streets, the court must determine that the improvement was a public necessity and for a public use.

EVIDENCE—EXPERTS. Objections going to the weight rather than the competency of expert evidence are properly overruled.

SAME—DAMAGES—EVIDENCE. Upon an issue as to compensation in condemnation proceedings, where damages were claimed by reason of loss of business while buildings were being raised to a new street level, evidence is admissible of the cost of an abutment on the street line which would permit of the use of the buildings without raising them.

SAME—IMPROVEMENT OF STREETS—RESTRICTION—JUDGMENT. In condemnation proceedings, where damages were claimed by reason of the raising of surrounding streets, on two of which approaches were proposed, extending not exceeding four hundred feet, plans, drawings and the testimony of the city engineer that the approaches were to extend but 163 feet, amount to a stipulation to that effect, and entitles the owner to have the restriction inserted in the judgment awarding damages by reason of the improvement with the approaches restricted to 163 feet.

Appeal from a judgment of the superior court for King county, Griffin, J., entered July 24, 1908, upon the verdict of a jury assessing damages in a proceeding to condemn land for street purposes. Modified.

Harold Preston and *Thomas T. Littell*, for appellants.

Scott Calhoun, *H. D. Hughes*, and *O. B. Thorgrimson*, for respondent.

[1]Reported in 104 Pac. 133.

Crow, J.—On January 6, 1908, the council of the city of Seattle passed Ordinance No. 17,764, to improve Mercer street, and to provide for the ascertainment and payment of just compensation to the abutting property owners for damages caused thereby. Afterwards, in this condemnation proceeding, prosecuted under the eminent domain act, the defendants O. B. Littell and wife, as owners of abutting lots, were awarded $1,600 damages by the verdict of a jury, and they have appealed from the judgment entered thereon.

The appellants own four lots fronting on the north side of Mercer street, extending through one entire block from Boren avenue north, on the east, to Terry avenue north, on the west. Their lots are located in a natural basin or depression near Lake Union. Mercer street is approximately on a level grade in front of the lots, but proceeds up grade toward Westlake avenue to the west, and also towards Eastlake avenue to the east. Republican, the next street south of and parallel to Mercer, has been raised and regraded. By the improvement of Mercer street the city intends to provide an easier grade extending a number of blocks from Westlake avenue to Eastlake avenue. Upon appellants' lots is a sash and door factory, consisting of several buildings equipped with machinery. Their present elevation is about three and one-half feet above Mercer street. The proposed improvement will necessitate the raising of Mercer street about fifteen feet at Boren avenue, and about ten feet at Terry avenue, which will leave the buildings from eight to twelve feet below grade, according to their respective locations. The proposed improvement also provides for approaches to Mercer street to be constructed and graded on Boren avenue and Terry avenue, immediately east and west of appellants' lots. The substantial effect of the entire improvement when completed will be to leave the appellants' lots in a basin inclosed by the surrounding streets.

By their answer appellants claimed damages in the total sum of $35,000. The city contended that their property

would be benefited in the sum of $10,000, and that the damage to their buildings would not exceed $4,000. Several assignments of error are presented, but it is evident that the main contentions upon which the appellants rely for a reversal are that the verdict is not warranted by the evidence, that damages should have been awarded in the sum of at least $30,000, and that a new trial should have been granted. Having carefully examined the evidence, we conclude that it was sufficient to sustain the verdict.

The appellants most strenuously insist that the undisputed evidence requires a much larger assessment of damages. We cannot, within the scope of an opinion of reasonable length, enter upon a detailed discussion of the evidence, which is voluminous, but will touch upon salient points only. Appellants' manufacturing plant includes a sash and door factory fronting on Mercer street, an engine room, boiler room, warehouse, dry kiln, office, barn, platforms, approaches, and other structures; all of which will be left below grade, and will either have to be raised or changed and protected in some other manner.

It appears that the proposed improvement is part of an extensive scheme by which a general regrading is being made throughout the locality in which appellants' lots are situated. The city contended the appellants' lots will be peculiarly and especially benefited to the extent of $10,000, by the improvement, and produced expert witnesses who so testified, while other city witnesses testified that for about $4,000 the buildings and machinery could be raised and readjusted. The city, therefore, insisted upon the trial that the benefits would exceed the damages, and that a verdict of no damages should be returned. The appellants introduced expert witnesses who testified that the lots would be damaged by the improvement in the sum of $10,000; that it would require an expenditure of about $29,000 to raise the buildings and readjust the machinery; that the plant would have to remain idle for about six months while such changes were being made, to

appellants' additional damage in the sum of $7,200, for loss of business profits. The jury inspected the property and its surroundings.

Proceeding upon the theory that most of the evidence offered by the city was incompetent and should have been stricken, appellants contend that their evidence was undisputed, and that the verdict should have been for a much larger sum. We think the evidence offered by the city, and admitted by the trial judge, was competent; and that appellants' only objections to such evidence were in effect addressed to its weight rather than its competency. If the jury accepted and credited the evidence offered by the city, as they were entitled to do, it was sufficient not only to sustain the verdict returned, but even one of no damages. This being a condemnation proceeding in which the jury not only heard the evidence, but also viewed the property, and their verdict having been sustained by the trial judge, an utter absence of evidence to support it would be our only justification for granting a new trial.

The question presented for our consideration is, not what our own conclusion from the evidence would be, but whether the conclusions of the jury as expressed in their verdict must stand. An appellate court should hesitate before setting aside the verdict of a jury in a condemnation case, and it will only make such order when it clearly appears that the verdict is unjust and unsupported by any competent evidence. 7 Ency. Plead. & Prac., 593-4; *In re East Spring Street*, 41 Wash. 366, 83 Pac. 242; *Conness v. Indiana etc. R. Co.*, 193 Ill. 464, 62 N. E. 221; *Fort Street Union Depot Co. v. Jones*, 83 Mich. 415, 47 N. W. 349; *Hartman v. Reading & P. R. Co.* (Pa.), 13 Atl. 774.

On a pure question of fact, such as is here presented, it is evident that the jurors who heard the witnesses and examined the property and were familiar with the situation and all of its surroundings, are much better qualified to estimate the damages to be awarded than this court would possibly be,

and the right to fix such damages being exclusively within the province of the jury, their verdict should not be disturbed except for the want of competent evidence to support it, for good cause.

Appellant contends that the trial court erred in declaring the improvement to be a public necessity, and one for the public use. The city council, by ordinance, directed the improvement to be made, and the condemnation proceedings to be instituted. Their purpose was to improve the street for the public use. They, in the first instance, had legislative authority to decide upon and determine the public necessity for such improvement. When evidence was presented showing that the ordinance had been properly passed, the trial court, in the exercise of its judicial functions, determined that the proposed improvement was a public necessity and for the public use. Under our previous rulings no other adjudication could have been made. *State ex rel. Schroeder v. Superior Court*, 29 Wash. 1, 69 Pac. 366; *State ex rel. Thomas v. Superior Court*, 42 Wash. 521, 85 Pac. 256; *Seattle v. Byers*, 54 Wash. 518, 103 Pac. 791.

Appellants moved the trial court to strike the testimony of three contractors whom the city produced as expert witnesses to show the probable expense of raising the buildings and readjusting the machinery, and now contend that the trial court erred in denying such motion. The objections made went to the weight of their evidence rather than its competency, and were properly overruled. Evidence was introduced by the city, and was admitted over appellants' objection, to show the cost of building an abutment on the curb line of Mercer street so as to protect appellants' buildings without raising them, and thus permit the continuation of the operation of the factory. This evidence was introduced for the purpose of showing one method which the city claimed could be adopted to lessen appellants' damages, and still enable them to continue their business. It was for the jury to determine whether the plan suggested was reasonable

or practicable, and we are unable to conclude that prejudicial error was committed by its admission.

Exceptions are also based upon instructions given and refused. Without entering upon their discussion, we find that the instructions given correctly stated the law, and that in the light of the issues and the evidence, they properly presented all points covered by the instructions requested.

The ordinance as passed provided for the construction and grading of approaches to Mercer street on Terry avenue for a distance back from Mercer street not exceeding four hundred and twenty-four feet. On the trial, the city, by drawings introduced as exhibits, and by the testimony of its engineer, showed that the grade of the approach actually to be constructed upon Terry avenue would not extend further than one hundred and sixty-three feet back from Mercer street, and the jury had such evidence before them for consideration in fixing the damages. The appellants, in the proposed form of judgment prepared and presented to the trial court for signature, caused the following restriction to be inserted:

"And provided further that no fill on said Terry avenue north of said Mercer street shall be made except a slope or grade running from said Mercer street north on said Terry avenue not to exceed 163 feet, until further proceedings for ascertaining and paying to said O. B. Littell and wife such damages as they may sustain by any further fill, grade or regrade be had as provided by law."

This restriction was stricken by the trial judge, and the appellants now contend that error was thereby committed. We think this contention should be sustained. The city's action during the trial amounted to a stipulation then made, to the effect that it would not extend the grade on Terry avenue further than one hundred and sixty-three feet north from Mercer street. While it is true that in a few questions propounded by the appellants to one or two of their witnesses some reference was made to a grade not exceeding four hundred and twenty-four feet, the entire record shows

that one hundred and sixty-three feet only was contemplated. This error is not of such a character as to require a new trial.

It is ordered that the final judgment be modified by inserting therein the words above quoted, which were stricken by the trial court. Otherwise the judgment as rendered will stand affirmed. The appellants will recover their costs in this court.

RUDKIN, C. J., CHADWICK, GOSE, MOUNT, and FULLERTON, JJ., concur.

[No. 7869. Department One. October 4, 1909.]

J. J. BRYS *et al.*, *Appellants*, v. CUTHBERT PRATT *et al.*, *Respondents*.[1]

ACTIONS—NATURE AND FORM—LEGAL OR EQUITABLE—TRUSTS—DAMAGES. A cause of action for damages is stated, and it is error to sustain a demurrer, where the complaint alleged the transfer of property of the value of $2,700 to trustees for the purpose of sale, $1,300 of debts to be paid out of the proceeds, and that the trustees fraudulently conspired with another and privately sold the property for $900; since no necessity for an accounting of the trust appears; or if shown by answer, the case can be tried either in equity or at law, the defendants not being confined to the issues tendered.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 31, 1908, dismissing an action for damages, upon sustaining a demurrer to the complaint. Reversed.

Hiram J. Jacobs and *Solon T. Williams*, for appellants.

Arthur P. Moran and *McClure & McClure*, for respondents.

[1]Reported in 104 Pac. 169.

FULLERTON, J.—The appellants began this action against the respondents, stating their cause of action in the following language:

"(1) That now and during all the times mentioned herein plaintiffs are and were partners under the firm name and style of Brys and Byers, and that the same were the true and real names of these plaintiffs, and that during all said times said defendant Seattle Merchants Association was and now is a corporation duly organized, existing and doing business under the laws of the state of Washington.

"(2) That on or about the 14th day of August, 1908, plaintiffs made, executed and delivered to the defendant I. H. Jennings, as trustee for said defendant association, a bill of sale of all their personal property, including book accounts, for the purpose of having said partnership wound up, all of its debts paid, and the balance, if any, to be returned to these plaintiffs, and under said bill of sale and said trust all of said property and said book accounts were turned over to said I. H. Jennings.

"(3) That the debts of said partnership did not at that time exceed the sum of Thirteen Hundred Dollars ($1,300), and the actual market value of the said partnership property and book accounts, so as aforesaid delivered to said I. H. Jennings, exceeded the sum of Twenty-seven Hundred Dollars ($2,700).

"(4) That said plaintiffs demanded in writing of said Jennings that said personal property be sold at public auction, but that said Jennings utterly disregarded said demand, and fraudulently, conspiring with said defendant Pratt, for the purpose of enabling said Pratt to secure said property at a price far below its actual cash value, fraudulently and corruptly sold said personal property and said book accounts to said Pratt for a consideration, the exact amount of which is not known to these plaintiffs, but which these plaintiffs are informed, did not exceed the sum of Nine Hundred and Twenty-four and 80-100 ($924.80). That had said property been put up at public auction, it would have realized a far greater sum than the amount so paid by said Pratt.

"(5) That during all the times herein mentioned the said defendant Jennings was the secretary and executive officer of the said corporation.

"(6) That by reason of the facts herein alleged the said plaintiffs have been damaged in the sum of Two Thousand Dollars ($2,000) no part of which has been paid.

"Wherefore plaintiffs pray judgment against the said defendants in the sum of Two Thousand Dollars ($2,000) and their costs and disbursements herein to be taxed."

To the complaint the respondents demurred, on the ground that it failed to state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, whereupon the appellants elected to stand thereon. A judgment of dismissal and for costs was thereupon entered against them, from which they appeal to this court.

The record does not contain the reasons which actuated the court in rendering its decision, but counsel for respondents argue that the action is one at law for damages, whereas it is shown that the respondents Jennings and Seattle Merchants Association are trustees administering a trust that has not been closed, and in which no accounting has been made or asked for, and that the remedy, if any the appellants have for the wrong done, is by a suit in equity for an accounting, in which suit the court will render complete justice even to the awarding of damages, if it be shown that the appellants have been damaged by the trustees' willful and fraudulent administration of the trust.

It has seemed to us, however, that this reasoning is not conclusive. If the appellants intrusted to the respondents personal property of the value of $2,700, to sell on their behalf, pay out of the proceeds debts of $1,300 and return the balance to them, and the trustees, in disregard of their trust, fraudulently conspired with another by which the property was sold for $924.80, an actionable wrong has been done them for which they may recover in an action at law.

The facts present no unusual complication; there is no long account to be taken and settled; the issue tendered is a simple one, and we see no reason why the question of fact may not be properly tried to a jury if the parties so desire it.

But the respondents are not confined to the issues tendered by the complaint. They are at liberty to set up in their answer any affirmative defense they may have to the transaction, whether these be equitable or legal or both, and if their defenses require the action to be tried as a legal action, or as an action of equitable cognizance, or as in part the one and part the other, the court can so try it under the code practice, and can enter such a judgment as the merits of the controversy require. We think a cause of action is stated in the complaint. The judgment is reversed, and remanded with instructions to reinstate the case and require the defendants to answer to the merits.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 7885. Department One. October 4, 1909.]

JOHN JOHNSON, *Respondent*, v. JAMES A. CAUGHREN *et al.*, *Appellants*.[1]

TRIAL—INSTRUCTIONS—ISSUES. Error cannot be assigned upon the giving of instructions outside the issues, where they were based on evidence admitted without objection.

SAME—REQUESTS. It is not error to refuse requested instructions covered in the general charge.

EVIDENCE—OPINION EVIDENCE—MASTER AND SERVANT—COMPETENCY OF FELLOW SERVANT. In a personal injury case, it is inadmissible to allow expert witnesses to give their opinion as to the competency of a fellow servant employed as a powder man, based upon observing his conduct, or knowledge of his experience, since the jury is as capable as the witnesses of drawing the proper inferences from the facts (CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for Klickitat county, McCredie, J., entered October 5, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an

[1]Reported in 104 Pac. 170.

action for personal injuries sustained by an employee through the premature explosion of a blast. Reversed.

A. L. Miller, *W. B. Presby*, and *N. B. Brooks*, for appellants.

Henry E. McGinn, for respondent.

FULLERTON, J.—The respondent brought this action to recover for personal injuries received while in the employ of the appellants, who were contractors doing construction work for the Portland & Seattle Railway Company on the north bank of the Columbia river. At the time of the injury the respondent was acting as assistant to one Ferguson, another employee of the appellants known as the powder man, the duties of the powder man being, among others, to superintend the drilling of holes for blasting, and to charge and explode the blasts. The immediate cause of the respondent's injury was the premature explosion of a blast. While assisting Ferguson in charging a drill hole for the purpose of springing it, the charge exploded prematurely, putting out both of his eyes.

In his complaint he alleged that the explosion was due to the unfitness and incompetency of Ferguson to perform the work for which he was employed. The appellants put in issue by answer the allegations of the complaint, and alleged affirmatively that the respondent assumed the risks incident to his employment, of which the premature explosion of a blast was one, and was himself guilty of contributory negligence; and further, that the negligence, if any, causing his injury, was the negligence of a fellow servant. On the issues thus formed a trial was had, resulting in a verdict and judgment in favor of the respondent for the sum of ten thousand dollars.

In support of their appeal, the appellants have made a number of assignments of error, the greater number of which we think deserve no special consideration. The evidence made a case for the jury, and consequently the court

did not err in denying the appellants' motion for a nonsuit made at the conclusion of the respondent's case in chief, or its motion for an instructed verdict made at the conclusion of the entire case. Nor was there error in giving or refusing to give instructions. The principal objections to the instructions given is that they are not based on issues made by the complaint and answers, but it is a sufficient answer to these objections to say that the instructions were based on evidence admitted without objection as if on sufficient pleadings. In such cases the court will treat the pleadings as the parties themselves have treated them, as sufficiently broad to warrant the introduction of the evidence. The substance of the instructions requested were included in the instructions given. In this state this is a sufficient compliance with a request to instruct.

The court, however, permitted certain witnesses to give their opinions as to the competency and fitness of Ferguson to perform the duties as a powder man, the witnesses answering that in their judgment he was incompetent and unfit to perform such duties. This we think was error. The general rule is that a witness must testify to facts, not opinions; that whenever the question to be determined is to be inferred from particular facts which can be readily produced before the jury, and the inference to be drawn therefrom is within the common experience of men in general, requiring no special knowledge, skill or training, the inference or conclusion is to be drawn by the jury and not the witness. In the case at bar, any witness having an opinion on the question of incompetency of Ferguson to perform the duties for which he was employed must have acquired it from observing his conduct, manner and actions while in the performance of his work, or from knowledge of his experience or lack of experience. These matters could be related to the jury by the witnesses substantially as they were observed by the witness, and the jury were just as capable of drawing just inferences from them as were the witnesses

themselves. This being so, it was the province of the jury to draw the inference, and it was error to let the witnesses draw it for them.

The cases on this precise question are conflicting, but it seems to us that the great weight of authority is with the rule as we have stated it. Mr. Thompson states the rule as follows:

"It may be stated as a general rule that, if the facts of any particular inquiry can be so placed before the jury that, as men of ordinary intelligence, they can fully understand the matter and draw the proper inferences and conclusions therefrom, the opinions and conclusions of a witness, whether an expert or a nonexpert, should not be received." Thompson, Commentaries on the Law of Negligence, §7747.

In 17 Cyc. 56, this language is used:

"The issue of negligence can in most cases well be determined by the judgment of a jury and the inference, conclusion, or judgment of witnesses is rejected. This rule has been applied, for example, to the question whether a bridge, road, roadway, sidewalk, track, or other place, machinery, mechanical appliance, rate of speed, situation, or other thing or collection or combination of things is safe or dangerous. The rule has also been applied to the question whether certain conduct of a person was careful or careless. And it has been applied to other questions as to conduct; as whether it was cautious, dangerous, 'in the line of duty,' necessary, negligent, proper, prudent, reasonable, professionally skilful, safe, usual, or unusual; and whether such conduct constituted good management, or omitted anything, The exclusion is subject to the proviso that the material facts can be placed before the jury. The same rule is naturally applied with even greater strictness where the inference is a more reasoned one; as whether sufficient time was afforded for the doing of an act; whether a workman, driver, engineer, motorman, or other person was competent for the work in which he was engaged; or was or was not habitually negligent. For like reasons a witness, even the actor himself, cannot state his inference as to the existence of contributory negligence or whether a person was or was not in the exercise of due care; or what would constitute reasonable care under given circumstances."

In each of these works a large number of cases are cited which support the text, and no attempt will be made to collect them here.

This court itself seems never to have had occasion before to pass upon the question directly. In *Sears v. Seattle Consol. St. R. Co.*, 6 Wash. 227, 33 Pac. 389, 1081, it was held not error to allow a witness to testify that a car was running at too high a speed to prevent the motorman to stop it within a given distance. The opinion, however, recognized the general rule "that witnesses may not give opinions as to matters of fact which the court or jury are ultimately to determine." The decision was rested on the ground that the evidence fell within an exception to the rule, namely; that "common observers . . . may state the results of their observations in regard to ordinary appearances and conditions of things which cannot be produced to a jury exactly as they were observed by the witness at the time." In *State v. Coella*, 8 Wash. 512, 36 Pac. 474, it was held not error to refuse to permit a witness to give his opinion whether the appearance of a certain room at a stated time indicated that a scuffle had taken place therein. In *Sutton v. Snohomish*, 11 Wash. 24, 39 Pac. 273, 48 Am. St. 847, it was held unobjectionable to permit a witness to give his opinion as to whether the respondent was badly hurt by a fall. The reason for the holding was not given, but presumably it rested on the ground stated in *Sears v. Seattle etc.*, *supra*. In *Keating v. Pacific Steam Whaling Co.*, 21 Wash. 415, 58 Pac. 224, it was held improper to permit witnesses to testify that, in their opinion, towing from the main mast of a seagoing steamer, at the same time using the main sail with the main boom, was unsafe. The case was affirmed, however, on the ground that the error was not prejudicial in the particular instance.

In *State v. Gates*, 28 Wash. 689, 69 Pac. 385, it was held not error to refuse to permit a witness to give his opinion

whether a certain Captain Beeson would operate a boat in a described manner; the court saying that the question called for a conclusion which was the right of the jury to determine from the facts proven, and the witness could not properly testify as to his opinion upon the fact, but should have related the facts and allowed the jury to draw the conclusion. In *De Wald v. Ingle*, 31 Wash. 616, 72 Pac. 469, 96 Am. St. 927, it was held error to permit a plaintiff in a personal injury action to give his opinion as to the amount of damages he had sustained by the injury received; the court resting its decision on the ground that the witness was asked to give his opinion covering the very question to be settled by the jury. To the same effect is *Berg v. Humptulips Boom and River Imp. Co.*, 38 Wash. 342, 80 Pac. 528. Other cases might be cited having more or less pertinence to the question in hand, but these show unmistakably the drift of opinion held by this court; that it is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge when the opinion involves the very matter to be determined by the jury, and the facts are capable of being presented to the jury on which the witness founds his opinion.

For the error noted, therefore, the judgment is reversed, and the case remanded for a new trial.

RUDKIN, C. J., GOSE, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting)—In my judgment, the competency of the man Ferguson to handle powder was a question calling for opinion evidence. It was an act requiring skill and knowledge not possessed by the ordinary man. It will not be denied that, had his acts and conduct, running over a certain time or covering a series of events, been described to the jury, it would have been competent to take the opinion of experts upon a hypothetical question based upon the evidence. This being true, I can see no reason why the opinion of those who had testified to his acts should be rejected, it

appearing that they had witnessed his conduct and knew the proper use of powder. I am not losing sight of the distinction between carelessness or negligence and incompetency. If the case involved the question of Ferguson's negligence only, the decision of the majority would be right. Proof of a single act, though showing negligence or carelessness, would not prove incompetency so as to charge the master, whatever the opinion of others might be. Further than this the citations from Mr. Thompson's work on Negligence and Cyc. do not go. The rule of this case would, in my judgment, shut off all expert testimony or opinion evidence on the question of the competency or incompetency of the servant, leaving it open to the speculations of the jury, with no fixed standard by which its judgment could be measured.

[No. 7913. Department One. October 4, 1909.]

B. L. Muir, *Respondent*, v. M. Francis Kane *et al.*, *Appellants*.[1]

Contracts—Consideration—Moral Obligation—Frauds, Statute of. An oral contract with a broker to pay commissions on the sale of real estate, void under the statute of frauds, raises a moral obligation which is sufficient consideration to support a subsequent written agreement to pay the same, after the rendition of the services.

Appeal from a judgment of the superior court for King county, Griffin, J., entered May 15, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover a broker's commission. Affirmed.

Rice & Frank, for appellants.

F. J. Carver, for respondent.

[1]Reported in 104 Pac. 153.

FULLERTON, J.—The respondent brought this action to recover of the appellants the sum of $200, alleged to be due pursuant to a written agreement executed and delivered to him by the appellants, whereby they agreed to pay him the sum of $200 for his services in selling for appellants a certain tract of real property. Issue was taken on the complaint and a trial had thereon, which resulted in a judgment in his favor for the amount claimed to be due. The case was tried by the court sitting without a jury. No question is raised as to the correctness of the facts found, but the case is here on the question whether these facts justify the judgment of the court.

The court's findings of fact are as follows:

"(1) That now and at all times herein referred to the plaintiff is and was doing a general real estate business in Seattle, Washington, under the firm name and style of B. L. Muir & Co. being the sole owner thereof.

"(2) That now and at all times concerned herein, the defendants are and were husband and wife.

"(3) That on or about the 21st day of November, 1906, the defendants made, executed and delivered to the plaintiff their written agreement agreeing to pay said plaintiff two hundred dollars ($200) for his services in selling for them a certain parcel of real estate; said agreement being in words and figures, to wit:

" 'M. Francis Kane and Ida Kane, his wife, agree to sell and Paul Bush agrees to buy the following described real estate situated in the County of King, State of Washington, to wit:

" 'South 40 feet of lot 1, block 17, J. H. Nagle's addition to the city of Seattle, for the sum of nine thousand six hundred dollars ($9,600) the purchaser having paid the sum of five hundred dollars ($500) the receipt of which is hereby acknowledged, as earnest money and part payment for said land, the same to be held in trust by B. L. Muir & Co. until the sale is closed or canceled and the balance of said purchase price shall be paid as follows, or as soon after said dates respectively as the title to said real estate is shown to be marketable, to wit:

" 'Three thousand dollars ($3,000) on or before the 22nd

day of Nov. 1906, at 1 p. m.; nineteen hundred dollars ($1,900) on or before the 22nd day of Nov. 1907, at 1 p. m.; four thousand dollars ($4,000) according to certain mortgage to be executed due in three years from date.

" 'The purchaser agrees to pay interest at the rate of six per cent payable semi-annually on all deferred payments.

" 'The vendor agrees to furnish an abstract of title made by a reliable abstract company, for said real estate showing a marketable title of record in the vendor free from encumbrances to date of conveyance except the street assessments amount to about two hundred dollars ($200) and if over $200 the surplus to be deducted from the nineteen hundred payment which the purchaser assumes and agrees to pay as a part of the above named purchase price, and the vendor further agrees to transfer said property to the purchaser by a good and sufficient warranty deed to the said vendee or his assigns and pay two hundred dollars ($200) of the purchase price to B. L. Muir & Co. for services rendered.

" 'The purchaser shall have one day's time after the delivery of said abstract for examination of same, and in case the abstract shall show a marketable title in the vendor, this sale shall be completed, and if the said title is not marketable and cannot be made so, then B. L. Muir & Co. shall refund to the said vendee the above named earnest money, and the sale shall be canceled, the deposit of $500 to be paid to Mrs. Ida Kane in the event of the purchaser failing to comply with this agreement.

" 'Witness our hands this 21st day of November, 1906.

" 'Signed and delivered in the presence of B. L. Muir.

" 'M. FRANCIS KANE, [SEAL.]
" 'IDA KANE, [SEAL.]
" 'PAUL BUSH. [SEAL.]'

"(4) That the plaintiff did make the sale referred to in said written contract and which sale was accepted by the defendants, but they have since failed, neglected and refused to pay the aforesaid two hundred dollars ($200) commission allowed, although the same is long past due and still the property of the plaintiff."

The statute governing contracts for commissions for buying or selling real estate provides that any agreement authorizing an employee, an agent or broker, to sell or pur-

chase real estate for compensation or a commission, shall be void unless the agreement, contract, or promise, or some note or memorandum thereof, be in writing. The appellants contend that the writing relied upon by the respondent is insufficient under the statute; that it is not an agreement authorizing the respondent to sell the real property described for compensation or commission, nor does it authorize or employ the respondent to sell real estate at all. Manifestly, if the writing sued upon was intended as an agreement authorizing the respondent to sell real estate of the appellants, it is faulty in the particulars mentioned, and so far deficient as not to warrant a recovery even if a sale had been made thereunder. But we do not understand that this is the question presented by the record. It is clear that this writing was not intended as an agreement authorizing the respondent to sell the real property mentioned. In fact, it was executed after that service had been performed, and is an agreement in writing to pay a fixed sum for a past service, not a service to be performed in the future. The question for determination is its validity as a promise to pay for a past service.

Looking to the instrument itself, there is nothing on its face that in any manner impugns its validity. It is a direct promise to pay a fixed sum of money for services rendered. *Prima facie*, therefore, it is legal and valid; and if it is illegal at all, it is because the actual consideration for the promise, which was alleged and proven, rendered the promise illegal. This consideration was the sale of real property for the appellants by the respondent acting as a broker, without a written agreement authorizing the service, and it is thought that because the statute declares an agreement for such a service void unless in writing, the service furnishes no consideration for the subsequent promise, since the service must either have been founded upon an invalid agreement or was voluntary. There are cases which maintain this doctrine. In *Bagnole v. Madden* (N. J.), 69 Atl. 967, the precise question was presented. There the plaintiff had been orally authorized

by the defendant to sell a parcel of real estate owned by the defendant. A purchaser was found and a contract of sale entered into. The defendant thereupon executed a written agreement and delivered the same to the plaintiff, wherein she promises to pay him $50 for his services. In an action brought upon the writing, the court held that she could not recover because of the invalidity of the original oral contract authorizing the services, it being in violation of the statute declaring such agreement void unless in writing. The case was rested on a decision of the Court of Errors and Appeals, *Stout v. Humphrey*, 69 N. J. L. 436, 55 Atl. 281, which announced the same doctrine, but upon a state of facts not quite the same; the subsequent promise to pay being oral instead of in writing. In the course of its opinion in the latter case, the court said:

"It is clear that if a contract between two parties be *void*, and not merely *voidable*, no subsequent express promise will operate to charge the party promising, even though he has derived the benefit of the contract. Yet, according to the commonly received notion respecting moral obligations, and the force attributed to a subsequent express promise, such a person ought to pay. An express promise, therefore, as it should seem, can only revive a precedent good consideration which might have been enforced at law through the medium of an implied promise had it not been suspended by some positive rule of law, but can give no original right of action if the obligation on which it is founded never could have been enforced at law, though not barred by any legal maxim or statute provision."

The court, it will be observed, makes a distinction between contracts formerly good but on which the right of recovery has been barred by the statute, and those contracts which are barred in the first instance because of some legal defect in their execution, holding that the former will furnish a consideration for a subsequent promise to perform, while the latter will not.

It has seemed to us that this distinction is not sound. The moral obligation to pay for services rendered as a broker in

selling real estate, under an oral contract where the statute requires such contract to be in writing, is just as binding as is the moral obligation to pay a debt that has become barred by the statute of limitations, and there is no reason for holding that the latter will support a new promise to pay while the former will not. There is no moral delinquency that attaches to an oral contract to sell real property as a broker. This service cannot be recovered for because the statute says the promise must be in writing; not because it is illegal in itself. It was not intended by the statute to impute moral turpitude to such contracts. The statute was intended to prevent frauds and perjuries, and to accomplish that purpose, it is required that the evidence of the contract be in writing; but it is not conducive to either fraud or perjury to say that the services rendered under the void contract, or voluntarily, will support a subsequent written promise to pay for such service. Nor is it a valid objection to say there was no antecedent legal consideration. The validity of a promise to pay a debt barred by the statute of limitations is not founded on its antecedent legal obligation. There is no legal obligation to pay such a debt; if there were, there would be no need for the new promise. The obligation is moral solely, and since there can be no difference in character between one moral obligation and another, there can be no reason for holding that one moral obligation will support a promise while another will not.

Our attention has been called to no case, other than the New Jersey case above cited, where the facts of the case at bar are presented. A case in point on the principle involved, however, is *Ferguson v. Harris*, 39 S. C. 323, 39 Am. St. 731. Certain persons, without authority from the defendant, had ordered lumber and used it in the erection of a building on the defendant's separate property, she being a married woman. Subsequently she gave her promissory note therefor, and when an action was brought upon the note she sought to defend on the ground of want of consideration. It

was conceded that there was never any legal obligation on the part of the defendant to pay for the lumber, but that her obligation was wholly moral. It was thereupon urged that such an obligation was insufficient to support the promise. Speaking upon this question the court said:

"All of the authorities admit that where an action to recover a debt is barred by the statute of limitations, or by a discharge in bankruptcy, a subsequent promise to pay the same can be supported by the moral obligation to pay the same, although the legal obligation is gone forever; and I am unable to perceive any just distinction between such a case and one in which there never was a legal, but only a moral, obligation to pay. In the one case, the legal obligation is gone as effectually as if it had never existed, and I am at a loss to perceive any sound distinction in principle between the two cases. In both cases, at the time the promise sought to be enforced is made, there is nothing whatever to support it except the moral obligation, and why the fact that, because in the one case there was once a legal obligation, which, having utterly disappeared, is as if it had never existed, should affect the question, I am at a loss to conceive. If, in the one case, the moral obligation, which alone remains, is sufficient to afford a valid consideration for the promise, I cannot see why the same obligation should not have the same effect in the other. The remark made by Lord Denman, in *Eastwood v. Kenyon*, 11 Ad. & E. 438, that the doctrine for which I am contending 'would annihilate the necessity for any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it,' is more specious than sound, for it entirely ignores the distinction between a promise to pay money which the promisor is under a moral obligation to pay, and a promise to pay money which the promisor is under no obligation, either legal or moral, to pay. It seems to me that the cases relied upon to establish the modern doctrine, so far as my examination of them has gone, ignore the distinction pointed out in the note to *Comstock v. Smith*, 7 Johns. 89, above cited, between an *express* and an *implied* promise resting merely on a moral obligation, for while such obligation does not seem to be sufficient to support an *implied* promise, yet it is sufficient to support an *express* promise."

To the same effect is *Anderson v. Best*, 176 Pa. St. 498, 35 Atl. 194, wherein it was said:

"The distinction sought to be made between considerations formerly good but now barred by statute, and those barred by statute in the first instance, is not substantial, and is not sustained by the cases."

See, also, *Bailey v. Philadelphia*, 167 Pa. St. 569, 31 Atl. 925, 46 Am. St. 691; *Stout v. Ennis*, 28 Kan. 706.

Believing as we do that the better rule is with the cases holding the moral obligation alone sufficient to sustain the promise, it follows that the judgment appealed from should be affirmed. It is so ordered.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 7929. Department One. October 4, 1909.]

ALBERT THOMPSON *et al.*, *Respondents*, v. CARRIE E. EMERSON *et al.*, *Appellants*.[1]

TAXATION—RECOVERY OF LAND SOLD FOR TAXES—TENDER OF TAX. Under Bal. Code, §§ 5678, 5679, a tender of the tax is a condition precedent which must be pleaded and proved in an action to recover land sold for taxes.

APPEAL—REVIEW—FINDINGS IN EQUITY—NECESSITY—TAXATION—RECOVERY OF LAND. Findings of fact not being necessary in equity, the omission to find a precedent tender of taxes paid does not vitiate a decree for the recovery of land sold for taxes.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 13, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to vacate a tax deed and to quiet title. Affirmed.

Fred H. Peterson and *Philip D. Macbride*, for appellants.

S. S. Langland, for respondents.

[1]Reported in 104 Pac. 201.

FULLERTON, J.—The respondents brought this action against the appellants to set aside a tax deed, quiet title to, and recover possession of, certain real property situated in King county. In their complaint, after alleging title and right of possession in themselves, they alleged, that the appellants had purchased the property at a tax sale, and had entered into possession under the title so acquired, and had subsequently paid certain taxes on the property, the precise amount of which they could not ascertain, although inquiry had been made of the appellants for the purpose of ascertaining the amount; that as nearly as they were able to compute the amount, it did not exceed thirty dollars, and this sum they had tendered to the appellants prior to the commencement of the action. The allegations of the complaint were denied by the appellants in their answer. A trial was had in which the court made findings of fact and conclusions of law, on which a decree was entered setting aside the tax sale and awarding the possession of the property to the respondents on certain conditions, one of which was that the respondents pay to the appellants $78.82, paid by the appellants as taxes on the property.

The court did not make any findings on the issue of tender—failing to find whether or not, prior to the commencement of the action, the respondents had tendered to the appellants the amount of taxes they had paid on the property. The evidence on which the findings and decree are based are not in the record brought to this court; the appellants basing their claim of error on the contention that these findings of fact did not justify either the conclusion of law drawn therefrom or the decree entered by the trial court.

The appellants rely for reversal on the fact that there is no finding of tender to the appellants of the taxes paid by them prior to the commencement of the action. That such a tender is a prerequisite to the right to maintain an action to recover land sold for taxes, and that it must be pleaded and proven as a precedent condition to the right to recover,

must be conceded. It is so provided by statute, and has been asserted to be the rule by this court in a long line of cases. Bal. Code, §§ 5678, 5679 (P. C. §§ 8733, 8734); *Merritt v. Corey*, 22 Wash. 444, 61 Pac. 171; *Rowland v. Eskeland*, 40 Wash. 253, 82 Pac. 599; *Moyer v. Foss*, 41 Wash. 130, 83 Pac. 12; *Kahn v. Thorpe*, 43 Wash. 463, 86 Pac. 855; *Ontario Land Co. v. Yordy*, 44 Wash. 239, 87 Pac. 257.

It must be conceded also that the findings are defective in the respect complained of. But it does not follow from this that the decree is void because of this defect. In an action of equitable cognizance, such as this one, there is a wide difference between the omission to find that an essential element governing the right to recover existed, and an affirmative finding that it does not exist. Since no formal findings of fact are necessary to support a decree in equity, it must follow that merely defective or incomplete findings will not render a decree invalid; for surely if the decree is valid without any findings at all, it cannot be in a worse position simply because it is accompanied by defective or incomplete findings. A decree without findings, or defective or incomplete findings, is sustained on the principle that the proceedings of courts of superior and general jurisdiction are presumed to be regular. In other words, error must appear affirmatively; it is not presumed from any mere defect or omission in matters that are not essential to be shown in order to constitute a valid record. So in the case before us, since it was not necessary that there be findings to support the decree, incomplete or defective findings will not invalidate it. The court will presume, in order to sustain the decree, that it was warranted by the evidence. Had the findings shown affirmatively that no tender had been made, a different question would have been presented; there would then have been no room for the presumption of regularity, and the decree would have been reviewed for error. But such a result does not follow from an omission in the findings. This question was before the court in *Gould v. Austin*, 52 Wash. 457, 100

Pac. 1029, and in *Clambey v. Copland*, 52 Wash. 580, 100 Pac. 1031, and was in each of them decided in accordance with our present holding.

The decree is affirmed.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 7984. Department One. October 4, 1909.]

A. R. WATSON *et al.*, *Appellants*, v. JENNIE C. BOYLE, *Respondent*.[1]

VENDOR AND PURCHASER—MERCHANTABLE TITLE. An abstract of title failing to show a conveyance from the patentee and requiring parol evidence to show inheritance from him and adverse possession thereunder, does not show a merchantable title which can be forced upon an unwilling purchaser.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered March 5, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Bates, Peer & Peterson, for appellants.

Wm. H. Pratt, for respondent.

FULLERTON, J.—On May 16, 1908, the appellants entered into a written contract with the respondent, Jennie C. Boyle, the defendant Alfred J. Boyle joining therein, by the terms of which the parties thereto mutually agreed to exchange properties, the appellants agreeing to convey to the respondent certain real and personal property in the county of Lewis in consideration of a conveyance by the respondent to them of property within the city of Tacoma, and the execution to them of a mortgage on the Lewis county property of

[1]Reported in 104 Pac. 147.

$2,800. The contract further provided that, within ten days after its date, the parties should exchange abstracts of their real properties, and within five days thereafter complete and carry out the provisions of the contract. The abstracts were exchanged within the time agreed upon, and within five days thereafter the respondent returned to the appellants the abstract furnished her by them, with certain written objections made to the title by her attorney to whom she had submitted the abstract for examination, accompanying the same with a letter from herself in which she notified the appellants that she would not perform the contract. Thereafter, the appellants brought the present action for a specific performance of the contract. A trial was had of the issues found, which resulted in a judgment in favor of the respondent.

While many questions are argued in the briefs, we have found it necessary to notice but one; namely, whether a merchantable title to the Lewis county property was tendered to the respondent. We think the title tendered was insufficient to comply with the contract, which required a good and sufficient title. The abstract tendered failed to show a conveyance from the patentee of the United States to the person from whom the appellants derived title. At the trial the appellants sought to close up this gap in their title by showing that their grantor was a son of the patentee, and derived his interests in the land by inheritance from his father and mother, and that they, together with their predecessors in interest, had been in the open, notorious, adverse, and exclusive possession of the property for a period equaling many times the statute of limitations. But as we held in *Coonrod v. Studebaker*, 53 Wash. 32, 101 Pac. 489, a party purchasing real property under a contract like the one at bar is entitled to a merchantable title, which we there defined to be one deducible of record reasonably clear from defects which affect its salability; one that does not require the purchaser to inquire outside of the record whether there are heirs or other persons whose rights may or may not be

precluded by lapse of time. A merchantable title is "such a title as a reasonably well informed and intelligent purchaser acting upon business principles would be willing to accept." *Cummings v. Dolan*, 52 Wash. 496, 100 Pac. 989.

It may be that the appellants showed with reasonable certainty that this title was one capable of being successfully defended. But this was not enough. Few persons care for that form of title which requires a resort to parol evidence to establish a link in its chain. And there is a well-founded reason for such dislike. Other conditions being equal, property so held is always passed by when offered for sale in competition with property held by title deducible of record. Such a title is more subject to attack by speculators in defective titles than is a record title, and when attacked more difficulty is experienced in establishing it than is in establishing the latter form of title. Land so held cannot be left vacant with the same safety as land held by title of record, and it seems that no matter how incontestable the parol proofs of title may be, a constant resort to the courts is necessary to enforce rights and contracts in connection therewith which pass unquestioned with other forms of title. For these and other reasons, such a title is undesirable, and courts will not force it upon an unwilling purchaser who has contracted for a marketable title.

The judgment is right and should be affirmed. It is so ordered.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8005. Department One. October 4, 1909.]

C. F. LATHROP, *Appellant*, v. JOHN C. SUNDBERG *et al.*, *Respondents*.[1]

LIBEL AND SLANDER—COMMUNICATIONS LIBELOUS PER SE. It is libelous *per se* for the physicians in an office building to sign and publish a petition to the owners of the building reciting that they as reputable physicians, desiring to uphold the honor of their profession, demanded the removal from the building of osteopaths . . . criminal practitioners . . . fakirs, quacks, charlatans and other fraudulent concerns and . . . undesirable tenants, intending to refer to the plaintiff, who was a duly licensed osteopath having an office in the building.

SAME—PRIVILEGED COMMUNICATIONS — INTEREST — ABUSE OF PRIVILEGE. Such a publication is not privileged from the fact of the interest of the parties; and the publication of the same in the newspapers would be an abuse of any privilege; also, an abuse in going beyond the necessities of the case.

Appeal from a judgment of the superior court for King county, Griffin, J., entered November 7, 1908, dismissing an action for libel, upon sustaining a demurrer to the complaint. Reversed.

Willett & Willett, for appellant.

McBurney & Cummings, for respondents.

FULLERTON, J.—This is an action for libel. In his complaint the appellant, who was plaintiff below, alleged that he was a regular graduate osteopath from a school of osteopathy, holding a doctor's degree as an osteopathic physician from such school; that at the time of filing his complaint he was, and for a long time prior thereto had been, practicing his profession in Seattle, in the state of Washington, having his office in the Eitel Building, in such city, which building was owned by the respondent Crane Realty Company; that on or about March 16, 1908, the respondents

[1]Reported in 104 Pac. 176.

published and circulated of and concerning him, in his business and professional capacity, a petition, addressed to the owners of the Eitel building, in the following words:

"We, the following reputable physicians and dentists, occupying offices in the Eitel building, endeavoring to uphold the honor and dignity of our professions and desiring to encourage only the best and most desirable tenants for our office building, and thereby conserve the best interests of the public at large, are most emphatically opposed to the indiscriminate rental of offices in this building to osteopaths, neuropaths, autopaths, chiropractors, uptomtereists, unprofessional masseurs, criminal practitioners, 'medical institutes', advertising 'specialists', patent medicine fakirs, quacks, charlatans and other fraudulent concerns. We therefore demand the removal of all such persons now holding offices in this building and the exclusion therefrom of all such undesirable tenants in the future."

He further alleged that the signers of the petition delivered a copy thereof with their names attached thereto to R. G. Shrader and the Crane Realty Company, and that these persons caused the same to be circulated and published. He then alleged that the respondents intended by the publication to, and did, charge him with being a quack and a charlatan in his profession, and with operating a fraudulent concern, and with being an undesirable tenant; and that such charges were false and untrue and were made wilfully, without just cause or excuse, and for the purpose of injuring and destroying the appellant's good name, and to expose him to hatred, contempt and ridicule, etc., and that by reason thereof, he has suffered damages in the sum of $75,000.

To the complaint a demurrer was interposed by the respondents, which the trial court sustained. The appellant thereupon elected to stand on the complaint, when a judgment of dismissal and for costs was entered against him. This appeal was taken therefrom.

The record does not disclose the ground upon which the trial judge sustained the demurrer to the complaint, but

counsel in this court contend that it was properly sustained for two reasons; first, that the writing on which the action is founded is not libelous, and second, if it be held to be libelous, it must be held to be privileged.

That the writing is libelous *per se*, it has seemed to us there can be but little question. In order to constitute a civil libel *per se*, it is not necessary that the words published should involve an imputation of crime. It is enough that they be of such a nature that the court can presume, as a matter of law, that they will tend to disgrace the party of whom they are published, or hold him up to public ridicule, or contempt, or cause him to be shunned or avoided. 25 Cyc. 250 *et seq.* The published article in question here tends to do all this, if it does not tend to do more. It carries an insinuation that the appellant is not a reputable physician, or one endeavoring to uphold the honor and dignity of the profession; it classes him with criminal practitioners, patent medicine fakirs, quacks, charlatans, and other fraudulent concerns; it demands his removal from the building in which he has his office, as an undesirable tenant, and demands that in the future he be excluded therefrom. Clearly this is libelous *per se*, if published of and concerning the appellant and he is engaged in a reputable practice, and that it was published of and concerning the appellant and that his practice is reputable, was distinctly alleged in the complaint.

In *Elmergreen v. Horn*, 115 Wis. 385, 91 N. W. 973, the libel charged was the following:

"Mr. Weisse may as well give up the fight against dear Samivel. We had supposed that Weisse had at least a fighting chance, if not an absolutely sure thing. But here comes 'Doctor' Ralph Elmergreen, the spick and span practitioner, who says that its all off, and that all the powers of Hades can't prevent Sam's re-election. The burden of the doctor's refrain is vindication—for Sammy. It appears that some untruthful Democrat misquoted Sam's Hartford speech—particularly that portion of it concerning the regulation of trusts. We do not know what Barney said about trusts;

neither do we care. Sufficient be it that we do not look to a quack to set us right in the matter. But listen to the doctor: 'His (Barney's) old-fashionness is of the Abe Lincoln type. He is a patriot, not a partisan. He never stoops to misrepresentation, exaggeration or trickery to gain votes. Mr. Barney is an honest man, a sincere man,' etc., etc., ad nauseam."

This was held not libelous *per se* by the trial judge, and an appeal taken from the ruling. Commenting thereon, the appellate court said:

"Candor compels us to say that we cannot discover any doubt, approaching the boundaries of reason, as to whether the term 'quack' was used with reference to plaintiff in his capacity as a physician and surgeon. Look at the words 'Here comes 'Doctor' Ralph Elmergreen, the spick and span practitioner.' Note the significance of the inclosure of the word 'Doctor' in quotation marks, indicating that the writer wished to dignify the plaintiff by the title of doctor in no other sense than that he was so called or held himself out to the world as such. Note the explanatory words immediately following the words 'Doctor' *Ralph Elmergreen*, the spick and span practitioner.' Do they not indicate a clear purpose to speak of appellant as a pretender, a person depending upon his appearance and assumption to be a doctor and not upon his qualifications as such. That is followed by language indicating that appellant had endeavored, by some publication, to correct a report deemed by him to be false as to what was said by Mr. Samuel Barney, the candidate for Congress, in a political address delivered by him. In connection with an expression to the effect that the writer did not know or care what Barney in fact said, occurs this: 'Sufficient be it that we do not look to a quack to set us right in the matter.' Taking the language all together, with the same certainty as it refers to plaintiff as a doctor, it refers to him as a quack doctor, as a mere pretender in his profession, a person not possessing the skill of a reputable practitioner of medicine, though assuming to have such skill."

So, in this case, while it is not directly charged that the appellant is a criminal practitioner, patent medicine fakir, quack, charlatan, or a fraudulent concern, he is classed with

them, and such is the evident meaning of the language employed.

The claim that the publication is privileged is equally without foundation. It is thought to be privileged because it was a communication concerning a matter in which the communicants had an interest and was made to another having a corresponding interest. But if the facts justified this contention, we think that the allegations of the complaint show such an abuse of the privilege as to justify a recovery if proven. The publication was not confined to the parties in interest. It was given to the newspapers and published to the world at large. The interests of the respondents did not require publication in this manner, and to so publish it was an abuse of the privilege. But, more than this, the communication itself went far beyond the necessities of the case. If the appellant's methods of practice were reputable, although disagreeable to the respondents, they have no interest which authorizes them to class him with disreputable practitioners, even in a communication that was otherwise privileged.

The complaint states a cause of action. The judgment appealed from is reversed, and remanded with instructions to reinstate the case and require the respondents to answer to the merits of the complaint.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8036. Department One. October 4, 1909.]

PACIFIC IRON & STEEL WORKS, *Respondent*, v. A. C. GOERIG, *Appellant*.[1]

MECHANICS' LIENS—FORECLOSURE—JURISDICTION—FAILURE TO PROVE LIEN. In an action in equity to foreclose a mechanics' lien, the court does not lose jurisdiction by plaintiff's abandonment of the lien at the trial, as defendant may have a jury trial on the issue of debt.

SAME—PERSONAL JUDGMENT. A personal judgment may be rendered in an action to foreclose a mechanics' lien upon proper evidence, whether the lien is established or not.

WORK AND LABOR—PERSONS LIABLE. Ownership of an article by defendant is not essential to a recovery for repairs thereon made at the instance and request of the defendant.

EVIDENCE — JUDICIAL NOTICE — RECORDS. The court cannot take judicial notice of its records in other actions.

COURTS—APPELLATE COURTS—JUDICIAL NOTICE. An appellate court cannot take judicial notice of what the trial court cannot judicially notice.

MECHANICS' LIENS—PARTIES PLAINTIFF—CAPACITY TO SUE—OBJECTIONS—WAIVER. It cannot be objected that a corporation has no capacity to sue in an action to foreclose a mechanics' lien for work and labor in repairing a machine, under Laws 1905, p. 137, where the claim for a lien was abandoned and not an issue at the trial.

Appeal from a judgment of the superior court for King county, Morris, J., entered November 24, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mechanics' lien. Affirmed.

James T. Lawler, for appellant.

S. D. Wingate and *John Wesley Dolby*, for respondent.

FULLERTON, J.—The respondent repaired a certain steam shovel at the request of the appellant, furnishing the necessary labor and material therefor. The work and labor was not paid for on its completion, and to secure payment, the

[1]Reported in 104 Pac. 151.

respondent filed a lien upon the shovel under the act of March 6, 1905 (Laws 1905, p. 137), the lien substantially conforming in form and substance to the requirements of the statute. Later on it began suit to foreclose the lien, averring in its complaint that it furnished the labor and material at the instance and request of the appellant, he being the owner of the steam shovel. Issue was taken on the allegations of the complaint, and the case set down for trial before that department of the court then sitting for the trial of causes of equitable cognizance.

At the trial the respondent introduced evidence tending to show that it repaired the shovel at the instance and request of the appellant, that the reasonable value of the labor and materials required for that purpose was the amount alleged in the complaint, and that no part thereof had been paid, but failed to show any fact tending to establish a lien upon the shovel for the materials furnished or work performed. When the respondent rested, the appellant moved to dismiss the case for want of jurisdiction, contending that since the respondent had failed to offer any evidence tending to establish the lien, his action became one at law, of which the equity department was without jurisdiction to hear or determine. The motion was overruled, whereupon the appellant offered evidence in his own behalf, the trial finally resulting in findings and a judgment in the respondent's favor.

It is first assigned that the court erred in exercising jurisdiction over the cause. It is argued that since the case was begun as a suit in equity to foreclose a lien, the court was without jurisdiction to determine it as an action at law to recover a money judgment. But this position is not tenable. The court unquestionably had jurisdiction of the action and the right to proceed with its trial upon the merits. If the appellant had asked for a jury trial on the legal questions involved after the appellant had abandoned the lien, the trial court might properly have granted the motion even to the extent of postponing the trial to a later time, especially as

the respondent introduced no evidence to establish its lien, but no error was committed in refusing to dismiss for want of jurisdiction.

It is next objected that the court was without authority to enter a personal judgment against the appellant, but manifestly there was nothing inherent in the proceedings that prohibited this form of judgment. A personal judgment is proper in an action brought to foreclose a lien, whenever the pleadings and evidence justify it. Such a judgment is not prohibited merely because the plaintiff seeks additional relief in the way of foreclosure of a lien, and this is true whether the lien is established or not.

Again, it is complained that the court erred in finding that the labor and materials were furnished at the request of the appellant, and that the appellant was the owner of the shovel. On these questions we think the weight of the evidence preponderates in favor of the finding of the court, at least, there is not such a doubt as to authorize us to find the other way. In the brief, however, our attention is called to a case, which was affirmed in this court, where a jury found that one Peterson, and not the appellant, owned this shovel at the time the respondent repaired it. But, aside from the fact that ownership of the shovel is immaterial, since it is shown that the repairs were made at the appellant's instance and request, the record of that case is not before us. To make it available as *res judicata*, the appellant should have pleaded it in his answer and introduced it as evidence at the trial. The superior court cannot, while trying one cause, notice judicially the records in other causes pending or tried before it, even when between the same parties, and what the trial court cannot judicially notice, the appellate court cannot notice when sitting in review of its judgment. *Lownsdale v. Grays Harbor Boom Co.*, 54 Wash. 542, 103 Pac. 833.

The only other assignment necessary to be noticed is that the respondent had no legal capacity to sue. This conten-

tion is founded on the wording of the statute authorizing the filing of liens; it being thought that the classification of the persons authorized to take advantage of the statute was not broad enough to include the respondent. But this contention is likewise untenable. The respondent is a corporation organized for the purpose, and engaged in the business, of operating a machine shop for the construction and repair of machinery. Clearly it has capacity to sue for work performed in its capacity as a machinist. Whether or not it can lawfully claim a lien under the statute is not a material question here. In this proceeding it was not allowed a lien thereunder.

Notwithstanding the appellant has devoted a large space in his brief to a discussion of the evidence, we feel that it would serve no useful purpose to enter upon its review at further length. Its perusal has convinced us that the proofs decidedly preponderate in favor of the respondent, and there being no errors of law in the record, the judgment will stand affirmed.

RUDKIN, C. J., GOSE, and CHADWICK, JJ., concur.

MORRIS, J., took no part.

[No. 8065. Department One. October 4, 1909.]

S. C. WOLDENBERG *et al.*, *Respondents*, v. O. S. SAMPSON *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—POWER TO CONTRACT—DELEGATION TO COMMITTEE. Where a town council determines upon the construction of a sidewalk and the character of the improvement, it may delegate the letting of the contract to a committee.

SAME—PAYMENT—ESTABLISHMENT OF SINKING FUND—INVALIDITY—EFFECT. Where a town council legally authorized an improvement, the want of power to establish a special sinking fund for its payment, as directed by the resolution, is not ground for an injunction forbidding the city to pay the cost of the improvement.

[1]Reported in 104 Pac. 184.

Appeal from orders of the superior court for Chelan county, Steiner, J., entered January 4, 1909, granting a temporary injunction and refusing to vacate the same, after a hearing on the merits before the court, in an action to restrain the construction of a sidewalk. Reversed.

J. J. King and *Reeves & Reeves*, for appellants.

Thomas & Sorenson, for respondents.

FULLERTON, J.—The town of Leavenworth is a town of the fourth class. At the time of the commencement of this action, the appellant Sampson was mayor of the town, and the appellants King, Ruth, and Featherstone and the respondent S. C. Woldenberg were members of the town council. In December, 1908, certain citizens of Leavenworth petitioned the council to construct a walk from the west end of the Clifford Hotel, on Front street in said town, to the east side of Second street therein, and for the purpose of aiding the construction thereof, they circulated a subscription list on which some $554 were subscribed to pay on the cost of construction. On December 9, 1908, the town council, at a regular meeting, adopted the following resolution pertaining thereto:

"Be It Resolved: That this council cause to be constructed an eight foot sidewalk and trestle along Front Street, and in length being from the Clifford Hotel to approximately 100 feet east of Second street, all in Ralston's Addition to Leavenworth.

"That the city clerk be instructed to advertise for bids in the next issue of the Leavenworth Echo, said bids to be based upon plans and specifications for construction now on file with the City Clerk.

"That the call for bids shall be published once and shall be closed to bidders Dec. 15th, 1908.

"That a special sinking fund be established, to be composed of 10 per cent of all monies received by the City Treasurer, to cover the municipal corporation's share of the expense of constructing the said thoroughfare. That this sinking fund be established at once and all monies received

hereafter be placed therein in the proportion set forth above and continue in force until the full amount to be paid for constructing said thoroughfare be collected.

"That this council accept donations from any who desire to make them toward defraying a portion of the cost of constructing said thoroughfare.

"That the mayor appoint a committee of three from the Council which committee shall have full right to accept or reject any bid offered, and to let the contract for the construction of said thoroughfare to the successful bidder upon his furnishing good and sufficient bond for the completion of said thoroughfare, and to accept or reject the work when completed."

The mayor thereupon appointed councilmen Ruth, King and Featherstone on the committee provided for in the resolution. The committee, acting in pursuance of the resolution, advertised for bids as there directed, and subsequently entered into a contract with the appellant W. J. Moon for the construction of the walk. The contractor Moon entered at once upon the performance of the work, and had practically completed the same when the present action was brought by these respondents to restrain further work thereon on the part of Moon, and to restrain the appellant Sampson, as mayor, and the appellants King, Ruth and Featherstone, from paying for the work with the money or funds of the town of Leavenworth. A temporary injunction was applied for at the time of filing the complaint, which application, after notice and hearing, the court granted. This appeal is from the order granting the temporary injunction, and from a subsequent order refusing to vacate the injunction on the motion of the appellants.

The trial court rested its order on the ground that the proceedings of the town council with reference to the construction of the walk were so far void as to create no obligation on the part of the city to pay for the same, and that any application of the funds of the city to that purpose would be a misappropriation of such funds. In support of

this conclusion, it is first said that the town council was without power to delegate to a committee the authority to enter into a contract for the construction of a walk; that the power to let a contract for that purpose involved the exercise of judgment and discretion, and that all such functions or powers, unless the law especially provides otherwise—and no such law exists on our statute books—must be exercised by the council. While there are cases that maintain this doctrine, the rule is not general, and we prefer the more liberal view. Here, it will be noticed, the council did not leave it to the committee to determine whether or not the walk should be constructed, or the kind and character of walk that should be constructed; on the contrary the council determined these matters for itself, and left to the committee only the power to enter into the contract necessary to carry out its order. This we hold was within the powers of the council. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659; 28 Cyc. 648.

The second reason given for sustaining the injunction is that the city was without power to establish a special sinking fund of 10 per cent of all moneys received by the town treasurer out of which to pay for the structure ordered. But if this contention was well taken, it would not authorize an injunction forbidding the city to pay the cost of any improvement legally authorized. If the money directed to be turned into a fund for the payment of the cost of the walk belonged to some other fund and was being wrongfully diverted, doubtless a party interested, or perhaps a taxpayer, could enjoin the wrongful diversion, but on that plea he could not enjoin the payment of a valid obligation of the town.

The injunctive order is therefore erroneous, and the same is reversed, and the cause remanded with instructions to vacate the temporary writ of injunction.

RUDKIN, C. J., GOSE, CHADWICK, and MORRIS, JJ., concur.

[No. 8088. Department One. October 4, 1909.]

PETER P. JUUL, *Respondent*, v. KITSAP TRANSPORTATION COMPANY, *Appellant*.[1]

WITNESSES—EXAMINATION—IMPEACHMENT—TIME — ORDER OF EVIDENCE. It is not an abuse of discretion to permit the recall of defendant's witness, after defendant rested, for the purpose of asking impeaching questions which should have been asked on cross-examination, where but a short time had elapsed and defendant was allowed to call witnesses and was denied no right or privilege.

SAME—MATERIALITY OF IMPEACHING QUESTIONS. In an action for injuries sustained by the alleged pulling in of a gang plank, upon which plaintiff was walking off a boat, where a witness for defendant testified that he was ahead of the plaintiff, and that plaintiff fell by reason of tripping on the witness' feet after getting clear of the plank, it is proper to allow impeaching questions tending to show that witness stated shortly after the accident that he felt the plank slipping before he reached the dock.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries for $5,000, reduced by the trial court to $3,000, is not excessive, where plaintiff's nose was broken, his foot permanently injured, and he was incapacitated for twelve weeks, losing wages at $2.50 per day.

Appeal from a judgment of the superior court for King county, Albertson, J., entered July 2, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger while landing from a steamboat. Affirmed.

Peters & Powell, for appellant.

John E. Humphries and *George B. Cole*, for respondent.

FULLERTON, J.—On July 28, 1907, the respondent took passage on one of the steamboats of the appellant transportation company at Seattle, in King county, for the purpose of going to Lisabeula, in Kitsap county. On arriving at the point last named, the boat made a starboard landing

[1]Reported in 104 Pac. 191.

at the public wharf for the purpose of discharging passengers. The tide was low when the boat reached the wharf, and the gang plank was extended from the hurricane deck of the boat to the wharf, and was even then inclined somewhat steeply, the ascent being towards the wharf. The respondent's evidence tended to show that, as he was leaving the boat and had reached about midway of the plank, it was pulled aboard the boat by the boat's crew, causing him to fall therefrom into the water below, by which fall his nose was broken and his foot badly injured, leaving him a permanent cripple.

The respondent was forty-nine years of age at the time of the accident, had been at one time a blacksmith, and was at the time of his injury working for the city of Seattle, receiving as wages $2.50 per day. He was incapacitated by reason of his injury for some twelve weeks, when he resumed work at the same wages. The jury returned a verdict in his favor in the sum of $5,000. This, on motion for a new trial, was reduced to $3,000, and for this sum judgment was rendered.

Error is first assigned on the examination of the witness H. J. Schweiker. The respondent testified in his own behalf to the effect that he was about the middle of the gang plank, and alone thereon, proceeding towards the wharf, when the plank was pulled in towards the boat, thereby throwing him into the water. In this he was corroborated by his wife and by several other witnesses who were on the wharf watching the boat make the landing. The appellant, when introducing evidence on its behalf, called the witness Schweiker, who testified in substance that he also was a passenger on the boat with the respondent, landing at the place the respondent intended to land; that when the boat reached the wharf and the gang plank was put out he ascended it immediately ahead of the respondent; that both of them reached the wharf and stepped clear of the plank, when the respondent in some way tripped upon the witness' feet and slipped and fell backwards into the water. He was then subjected to quite a lengthy cross-examination, and excused from the witness

stand. The appellant, after introducing some further evidence, rested its case, whereupon the respondent introduced witnesses in rebuttal, finally calling the witness Schweiker, and obtaining leave of court, asked him certain impeaching questions which he was allowed to answer over the appellant's objection. Afterwards witnesses called by the respondent testified, over the appellant's objection, that the answers made to the impeaching questions were untrue.

The appellant contends that the ruling of the court in this particular was error, for two reasons; first, because it was an abuse of discretion to permit the witness to be recalled after the appellant had rested its case; and, second, because the subject-matter of the impeaching questions was of itself inadmissible. We think neither of these objections tenable. Undoubtedly, under the strict rules of practice, the impeaching questions should have been propounded to the witness before he left the witness stand, after he had been examined in chief and was turned over to the respondent for cross-examination; but whether the strict rule shall always be adhered to is a question resting in the sound discretion of the trial judge, to be reviewed in the appellate court only for manifest abuse. In the record before us there is nothing to show an abuse of discretion. Only a short time elapsed between the time the witness was excused until he was recalled and the impeaching questions propounded to him, and no privilege or right was denied the appellant because thereof. There was, therefore, no abuse of discretion.

The question asked the witness was whether he did not state, in the presence of certain persons who were witnesses to the accident, shortly after leaving the gang plank, that he felt the plank slipping before he got off of it. Clearly this was material. If the witness did so state, it controverts his testimony to the effect that both he and the defendant got clear of the plank before the accident, and that the accident was the result of the respondent's tripping over the witness' heels and not to any movement of the gang plank. This be-

ing so, it was sufficiently connected with the question at issue to warrant its submission to the consideration of the jury. The case of *Bailey v. Seattle & Renton R. Co.*, 32 Wash. 640, 73 Pac. 679, is not in point here. In that case the impeaching question related to a matter immaterial to the issues between the parties; while here the impeaching questions related to material matters.

The other contention is that the amount of recovery is still excessive, notwithstanding the reduction of the verdict by the court. But, as we have stated, the respondent's nose was broken and deformed, and his foot permanently injured, although not sufficient to render it useless, yet sufficient to limit its natural movement in some degree, rendering it less useful than it was before the accident.

The evidence should be clear and plain that a verdict is excessive before it is set aside by an appellate court on that ground. We cannot so hold in the case before us.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8094. Department One. October 4, 1909.]

P. H. MADLER *et al.*, *Respondents*, v. PHIL A. SILVERSTONE *et al.*, *Appellants*.[1]

DAMAGES—CONTRACT—BREACH—"LIQUIDATED DAMAGES." A stipulation in a contract for the exchange of real estate to pay and forfeit the sum of $500 as liquidated and agreed damages for nonperformance of the contract by either party, is to be construed as liquidated damages and not as a penalty, since the damages suffered by a breach are uncertain, and the sum stipulated is not disproportionate to the probable damages, or unconscionable.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 26, 1909, upon findings

[1]Reported in 104 Pac. 165.

in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Judd & Olson, for appellants.

C. L. Holcomb, for respondents.

FULLERTON, J.—On June 23, 1908, the appellants Silverstone entered into a written agreement with the respondents, Madler, for a mutual exchange of properties, the agreement being in the following language:

"This Agreement made and entered into this 23rd day of June, 1908, by and between Phil A. Silverstone and Sadie Silverstone, husband and wife, parties of the first part and P. H. Madler and Nell S. Madler, husband and wife, parties of the second part Witnesseth:

"That for and in consideration of the sum of One Dollar each to be paid by each of said parties hereto to the other party, and the mutual covenants and agreements to be performed herein by the respective parties, the parties of the first part herein promise and agree to convey to the parties of the second part, or to their order, by good and sufficient warranty deed, the following described real estate in King County, Washington, to wit:

"Lots eleven (11) and twelve (12) in Block Nine (9) in Law's Second Addition to the City of Seattle located on the North east Corner of Third Ave. West and Blaine Streets, free and clear from all incumbrance, and lots four (4) five (5) six (6) seven (7) eight (8) nine (9) ten (10) eleven (11) twelve (12) and thirteen (13) on Block Five in Wood's Green Lake Park Addition to the City of Seattle, located at the North east corner of Nineteenth Ave. N. E. and Sixty-fifth streets, free and clear from all incumbrance except a mortgage of $33 against each lot and which is payable on or before November 1st, 1908, and the said parties of the first part agree to furnish parties of the second part a complete abstract of each lot and a written opinion of a reputable attorney of Seattle, who is competent to pass on such titles, showing good title in said parties or the person making such good and valid conveyance.

"The parties of the second part agree to convey, by good and sufficient warranty deed to the parties of the first part,

Lot twenty four (24) in Block Thirteen (13) of University Park Addition to the City of Seattle, with all improvements thereon, known as No. 4734 University Boulevard, free and clear of all incumbrance excepting a $2500 mortgage incumbrance, with interest thereon at 7% per annum, and said parties of the second part agree to furnish to the parties of the first part an abstract of title and the written opinion of title thereon by Shank & Smith, attorneys of Seattle.

"And the parties of the first part agree to execute a second mortgage with note to the order of the parties of the second part for the sum of Three Hundred thirty ($330) Dollars, payable on or before November 1st, 1908 with interest thereon at 8% per annum and covering lot 24 of Block 13 in University Park Addition to Seattle, Washington.

"It is understood and agreed that if either of the parties to this contract shall fail to comply with the conditions hereof or to carry out any agreement herein by such party to be performed, such party shall pay and forfeit to the other party the sum of Five hundred ($500) Dollars as liquidated and agreed damages.

"It is understood and agreed that each of the parties will pay one half of the cost of drawing up this contract, deed and mortgages and all expenses of this transaction.

"Each of the parties hereto covenant and agree to fully perform their respective portions of this contract within ten days from the date hereof. In case of defect of title to either property which cannot be made good, the penalty clause herein to be inoperative."

The agreement was not performed, and the respondents brought this action against the appellants to recover the sum named therein as liquidated and agreed damages, averring in their complaint that the failure to so perform was due to the fault of the appellants. The cause was tried by the trial court sitting without a jury, and is brought to this court on the findings of fact made by that court, the evidence on which the findings are based not being in the record. The court found the due execution of the contract, a failure to perform on the part of the appellants, that the failure to so perform was not due to any fault of the respondents, and that by

reason of the refusal and failure of appellants to perform the contract the respondents had "been damaged in the sum of $500, the amount provided in the contract as liquidated damages;" finding further that there was no evidence of pecuniary loss to the respondents other than is contained in the written contract. The court thereupon entered a judgment for the respondents, for the amount so found to be due as liquidated damages, and this appeal was taken therefrom.

But one question is suggested by the record; namely, is the provision of the contract whereby the one party agrees to pay and forfeit to the other the sum of $500, if such party fails to comply with the conditions of the contract, a provision for liquidated damages, or is it a penalty. The appellants strenuously contend that it is a penalty, and rely for authority upon the former holdings of this court. The first case called to our attention, where an agreement to pay a fixed sum in case of a breach in the performance of the conditions of a contract was considered, is *Reichenbach v. Sage*, 13 Wash. 364, 43 Pac. 354, 52 Am. St. 51. In that case the appellants' principal contracted with the respondent to construct a certain building to be completed by a given date, agreeing to pay $10 per day for each and every day the completion of the building was delayed beyond the date named. The court below held the provision to be one for liquidated damages and not a penalty, and its judgment was affirmed by this court. Passing upon the question, the court said:

"We think the question which should be logically first settled in this case is: Was the contract to pay the damages specified, a provision for a penalty or for liquidated damages? There has been some conflict of authority on this question, each case, however, necessarily being decided with reference to its own particular circumstances and the particular language of the contract. We are satisfied, however, that the overwhelming weight of authority sustains the contention that this contract provides for liquidated damages; there is nothing inequitable in the terms of this provision; the amount does not seem to us to be excessive or unreasonable; it does not provide for the payment of a sum in gross on the failure

to comply with the contract at the expiration of the time limited, but the damages accrue according to the length of time the breach continues; and again, there is an element of uncertainty as to the real damages which would be maintained by the plaintiff which renders it more or less impracticable to be determined by a jury. Values of rents are fluctuating, and dwelling houses of the character and description of this one are ordinarily not built for rent at all, but for the convenience and comfort of the owners, and inasmuch as the parties saw fit to settle in advance the question of damages, and it seems to be on an equitable basis, we do not feel justified in disturbing that contract and holding that it was a contract which the parties had no right to make." . . .

"We think these contracts should be sustained, where no fraud or illegality appears, as a matter of policy, for it would frequently save expensive and troublesome litigation, if the parties could contract in advance with reference to damages, with the knowledge that such contracts would without question be enforced."

To the same point is, *Drumheller v. American Surety Co.*, 30 Wash. 530, 71 Pac. 25, and *Jenkins v. American Surety Co.*, 45 Wash. 573, 88 Pac. 1112.

In *Everett Land Co. v. Maney*, 16 Wash. 552, 48 Pac. 243, the appellant contracted to purchase of the respondent certain lots for a consideration of $3,000, which he secured by a mortgage on the lots purchased. In addition to the contract to pay the purchase price, the appellant gave an obligation called a bond, in the sum of $4,000. The respondent executed to the appellant a contemporaneous agreement whereby he agreed that if the appellant would build upon the lots sold him a brick building of the value of $16,000, within eighteen months, the $4,000 obligation should be canceled. The building was not constructed, and in an action to foreclose the mortgage and recover on the $4,000 obligation, it was contended that this obligation was in no sense a part of the purchase price, but an obligation fixing a penalty for failure to erect the brick building, on which the respondent was entitled to receive the actual damages caused by such failure. The obligation was held to be one for liquidated damages, the

court saying that the damages resulting from the breach were so indefinite and uncertain and difficult to prove, that the amount stipulated fell within the rule of liquidated damages.

In *Jennings v. McCormick*, 25 Wash. 427, 65 Pac. 764, where the owners of adjoining lands, which were protected from overflow from high tides by means of dikes and dams, entered into an agreement whereby one of the owners contributed $200 toward the construction of another dike on condition that the original dikes which were owned by others were not cut, leveled, or damaged in any way, and stipulated that in case they should be so cut, leveled or damaged the money contributed should be refunded to him, it was held, on a breach of the agreement, that the contributor could recover the whole sum contributed as liquidated damages. And in the case of *American Copper etc. Works v. Galland-Burke Brewing etc. Co.*, 30 Wash. 178, 70 Pac. 236, it was held that a clause in a contract for the delivery of certain machinery by a certain day, providing for the payment of $25 per day for each day the delivery should be delayed beyond the day named, was a provision for liquidated damages and not a penalty.

Of the cases holding the obligation to be a penalty, the first is that of *Krutz v. Robbins*, 12 Wash. 7, 40 Pac. 415, 50 Am. St. 871, 28 L. R. A. 676. In that case it was held that an agreement by a mortgagor to pay an increase of interest to the mortgagee in case the mortgagor defaulted in any of his interest payments, or in the payment of taxes levied upon the property, was in the nature of a penalty, and not recoverable in a suit to foreclose the mortgage.

In *McDaniels v. Gowey*, 30 Wash. 412, 71 Pac. 12, a vendor of land, on which there were certain liens, gave a bond to the vendors in the sum of $4,000, conditioned that if the obligors should on or before a certain date procure a satisfaction and discharge of certain liens thereon, the obligation should be void, otherwise to remain in full force and effect. In a suit upon the bond it was held that the obligation was

one imposing a penalty and not one for liquidated damages.

In *Johnson v. Cook*, 24 Wash. 474, 64 Pac. 729, it was held that a bond conditioned that the obligor should build, or cause to be built, for the obligee a house of a certain description which should cost not less than a given sum, and that the obligor should pay all liens and incumbrances that might become liens on the property by reason of the erection of the house, was a stipulation for a penalty and not one for liquidated damages.

It would too unduly extend this opinion to set at length the reasoning by which those several decisions were justified, but the same principle runs through all of them. Generally speaking, it may be said, that when the damages arising from the breach of the contract which the obligation is given to secure, are uncertain in their nature and not readily susceptible of proof by the ordinary rules of evidence, and are not so disproportionate to the probable damages suffered as to appear unconscionable, and it is reasonably clear from the whole agreement that it is the intention of the parties to provide for liquidated damages and not a penalty, such a stipulation will be held to be one for liquidated damages. On the other hand, if the stipulation is inserted to secure the payment of a definite sum of money, or if the actual damages suffered are easily ascertainable and are less than the stipulated sum, or if the principal agreement contains provisions for the performance or nonperformance of several acts of different degrees of importance, and the stipulated sum is to be paid on the violation of any or all of them, and the sum will in some instances be too large, or if from an examination of the written agreement it is uncertain whether it was the intent of the parties that the stipulation was intended as liquidated damages, or as a penalty, it should be treated as a penalty.

Tested by the foregoing rules, it would seem that the stipulation in the contract in question here is a stipulation for liquidated damages rather than one for a penalty. The dam-

ages suffered for the breach of the agreement are uncertain in their nature, the sum stipulated is not so disproportionate to the probable damages suffered as to appear unconscionable, and it appears clear to our minds that the parties intended to stipulate for a fixed sum as damages, rather than for a penalty.

The appellant, however, argues with much force, that the case falls within the rule of the case of *McDaniels v. Gowey, supra;* that the principal agreement contained provisions for the performance of several acts of different degrees of importance, and the sum stipulated is to be paid on the violation of any or all of such provisions. The contract, by the form in which it is written, it will be observed, lends color to these contentions, but a more careful analysis will show that it has but one primary purpose, namely, to provide for an exchange of properties. The several conditions to be performed by the parties are but steps leading up to that primary purpose, and it is clear that the stipulated sum was intended to fix the amount of damages to be paid by the party in default in case the contract as a whole was not carried out. In our opinion the stipulation was one for liquidated damages, and the judgment will stand affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 7578. *En Banc.* October 4, 1909.]

L. F. BOOTHE, *Appellant*, v. SUMMIT COAL MINING COMPANY *et al.*, *Respondents.*[1]

CORPORATIONS—OFFICERS—SALARY—INCREASE BY OWN VOTE AND SUBSERVIENT TRUSTEES. An increase in the salary of an officer of a corporation who was a trustee and owned half of the stock, through his own vote and the votes of trustees subservient to him, is fraudulent and illegal; and this, regardless of the value of the services, where it was improperly made in violation of an agreement with the owner of the other half of the stock.

CORPORATIONS—RECEIVERS—SOLVENCY—DEADLOCK AND DIFFERENCES. A temporary receiver should be appointed for a corporation, though solvent and prosperous, where two persons at bitter enmity with one another, each held one-half of the stock, and through a deadlock and inability to elect officers, one of them, as a hold-over trustee, with two subservient dummies, seized complete control of the corporation, excluded his rival from all participation in the business, refused him an inspection of the books, and illegally increased his own salary, and it appears that a new board cannot be elected, and there is no prospect of adjusting the differences; and the receivership will be made permanent in case the differences cannot be adjusted within a time limited.

CONTRACTS — CONSTRUCTION—"PROFITS"—DEPRECIATION OF PLANT. Where the owner of all of the stock of a coal mining corporation sold one-half thereof under an agreement reciting that the profits to be divided did not include the profits in the business of the mining company made prior to April 1st, 1906, by "profits" the parties understood and meant that which would remain after deducting the cost of operation from the income of the mine, and no deduction for depreciation in the plant or machinery was contemplated (CROW, MOUNT, FULLERTON, and DUNBAR, JJ., dissenting).

Appeal from a judgment of the superior court for Kittitas county, Kauffman, J., entered December 21, 1907, in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action for equitable relief. Reversed.

Kerr & McCord, for appellant.

Ballinger, Ronald, Battle & Tennant, for respondents.

[1]Reported in 104 Pac. 207.

Crow, J.—This action was commenced by L. F. Boothe, a stockholder, against Summit Coal Mining Company, a corporation, Robert J. Linden, and others, to compel Robert J. Linden to account for moneys appropriated, to obtain the appointment of a receiver, and for other equitable relief. The trial judge dismissed the action. The plaintiff has appealed.

From the evidence we find that the Summit Coal Mining Company was incorporated in this state in October, 1903, with $50,000 capital stock divided into 500 shares of $100 each; that it owns a coal mine in Kittitas county, equipped with an operating plant; that on May 19, 1906, the respondent Robert J. Linden owned all of the capital stock except fifty shares held by one James Cronin, and some two or three other shares; that on said date the appellant, L. F. Boothe, purchased 250 shares from R. J. Linden, and also purchased a half interest in a merchandise business in Portland, Oregon; that later the merchandise business was resold to Linden; that Linden executed and delivered to Boothe a receipt reading as follows:

"Portland, Oregon, 5-19-06.

"Recd. from L. F. Boothe Fifteen Thousand Dollars as part payment on Two Hundred and Fifty shares of Summit Coal Mining Company stock at One hundred Dollars per share, and a one-half interest in my merchandise business representing one-half the outstanding a-cs of said merchandise business existing on May 1st, '06, and one-half the merchandise on hand on said date, the profits accruing in the business of the Summit Coal Mining Company from and after the first day of April, 1906, to be divided in accordance with the amount of stock or interest held and is not to include profits made prior to April 1st, 1906; all debts contracted by the Summit Coal Mining Company and any debts connected with my merchandise business prior to said date to be assumed and paid by R. J. Linden; this does not include credit to account of R. J. Linden on books of Summit Coal Mining Company.

"(Signed) R. J. Linden."

that the credit of R. J. Linden then standing on the books was about $2,900; that Boothe and Linden agreed they should each draw a salary of $125 per month, from the min-

ing company, for services to be rendered; that Boothe was to become a trustee and officer; that he completed his payments on the stock in July, 1906; that a certificate for 248 shares was at his request transferred to him, and two certificates for one share each to his wife and son; that Robert J. Linden purchased the stock of James Cronin, and that the entire capital stock was then owned, 250 shares by Boothe, and 250 shares by R. J. Linden who held 248 shares in his own name, and two shares in the names of others; that when Boothe purchased his stock, Robert J. Linden, Pearl K. Linden, his daughter, and James Cronin were trustees; that Cronin sold his stock to Robert J. Linden on June 19, 1906; that on November 10, 1906, after the difficulties hereinafter mentioned had commenced, the remaining trustees, Robert J. Linden and Pearl K. Linden held a special meeting at which they elected the respondent G. R. Percival as trustee, he then holding one share of stock which had been transferred to him on the preceding day by Emma Linden, wife of Robert J. Linden; that shortly after Boothe purchased his 250 shares he commenced active work, in connection with Robert J. Linden, in operating the coal mine; that at his suggestion a new tramway was installed; that differences arose between him and Robert J. Linden which became so bitter that Linden excluded Boothe from any participation in the affairs of the corporation, assumed sole charge, and completed the tramway; that Boothe then demanded an inspection of the corporation books, which was at first refused; that later he was reluctantly permitted to inspect the books, with the aid of an expert, from and after April 1, 1906, but positively prohibited from seeing them for any prior period; that the books when inspected disclosed that at different times from March 30, 1906, to December 31, 1906, Robert J. Linden had caused himself to be credited with $6,515.25, $1,539.37, and $1,101.24 which he now claims he was entitled to receive as profits earned prior to April 1, 1906; that at one time when Boothe was inspecting the books, he and Rob-

ert J. Linden became engaged in a personal encounter, resulting from their bitter enmity and irreconcilable differences; that an annual meeting of the stockholders was held in Seattle on January 14, 1907, the minutes of which read as follows:

"The regular stockholders' meeting of the Summit Coal Mining Company met, pursuant to adjournment this A. M., at the office of Ballinger, Ronald, Battle & Tennant in Seattle, Washington, at this the hour of 1:30 o'clock P. M. this day, there being present the following stockholders either in person or by proxy, and representing the following number of shares:

L. F. Boothe	248	shares
D. P. Boothe	1	"
Charline Boothe by L. F. Boothe, her proxy	1	"
R. J. Linden	248	shares
P. K. Linden	1	"
G. R. Percival	1	"

being all of the stockholders and representing all of this stock of this corporation.

"Whereupon, the meeting having been called to order by the president, he stated that this being the time for the election under the by-laws, of a board of trustees for the ensuing term, nominations for the office of trustees for the ensuing year are now in order, whereupon the following three persons were nominated by L. F. Boothe: L. F. Boothe, Charline Boothe and D. P. Boothe. G. R. Percival then nominated the following: R. J. Linden, Pearl K. Linden and G. R. Percival.

"Upon vote being taken, it was found that L. F. Boothe, Charline Boothe and D. P. Boothe each received 250 votes; that R. J. Linden, P. K. Linden and G. R. Percival each received 250 votes, whereupon the president declared that no person having received a majority, there was no election.

"Whereupon L. F. Boothe asked if an annual report had been made by the officers and was ready to be read. The president informed the stockholders that such report was not ready, but promised that he would prepare the same as early as possible and file the same of record, furnishing a copy thereof to Mr. L. F. Boothe.

"At this point Hon. Carroll B. Graves, on behalf of the 50% of the stock held by L. F., D. P. and Charline Boothe, announced that under the circumstances the stock held by the Boothe's would continue to be voted for the said nominees for trustees made by L. F. Boothe. A like announcement was made by the holders of the other 50% of the stock to the effect that that would be voted to the nominees for trustees made by G. R. Percival.

"Thereupon said Graves suggested as a compromise that R. J. Linden name one and L. F. Boothe name one person who should be elected trustees, and that the said Linden and Boothe should then select a third party who should select or name the third person to be elected as trustee, which suggestion was declined by the holders favoring the election of the persons nominated by said Percival.

"Thereupon a motion was made and seconded to adjourn, which motion, being duly put, was unanimously carried."

That immediately after the adjournment of the stockholders, the annual meeting of the holding-over board of trustees was convened, at which, without electing officers or transacting any other business, the following resolution was adopted:

"Resolved that the salary of R. J. Linden as President-Treasurer and general manager of the business of this corporation be made four hundred dollars per month for the year 1907."

That Linden had drawn $125 per month from and after Boothe's purchase of stock, until the annual meeting, and thereafter drew $400 per month; that Boothe was paid $125 for one month only, and that in July, 1907, the appellant, Boothe, commenced this action. Other facts shown by the evidence will be hereinafter stated.

The appellant contends that the trial court erred, (1) in refusing the appointment of a receiver; (2) in refusing a decree requiring Robert J. Linden to restore to the corporation moneys misappropriated by him; (3) in rulings on the evidence; and (4) in dismissing the action. These assignments will be considered together.

There is no question but that Robert J. Linden is in complete control of the corporation, which he is conducting under the authority of a pliant board of trustees, consisting of himself, his daughter, and one other person, the two latter being subservient to his will, and holding over by reason of the inability of the stockholders to elect their successors. Although legal trustees, they are used by Robert J. Linden as an instrument to retain control and exclude Boothe from participation in the corporation. Linden and Boothe each own one-half of the capital stock; they are in irreconcilable conflict; the former is in control, and it is impossible to change this situation by the election of new trustees. Corporations are presumed to be governed by a board and officers representing a majority of the capital stock, but here we find a board consisting of one active and two subservient, dummy trustees, sustained by one-half of the capital stock or less than a majority, and we should carefully scrutinize their acts.

The respondent Robert J. Linden contends that he was entitled to the three credits entered on the books as profits earned prior to April 1, 1906. The dispute between him and Boothe arises from their difference of opinion as to what should constitute profits. The receipt signed by Linden disclosed their agreement as to profits earned prior to April 1, 1906. It stipulated that all such profits should be retained by him. The trial was adjourned to afford the appellant his first inspection of the books covering periods prior to April 1, 1906. They disclosed that in October, 1904, the respondent R. J. Linden and one Goodsell acquired all of the capital stock, and made entries placing a valuation of $25,000 on the real estate or mine, and $25,000 on the mining plant, tramway, machinery and fixtures. Linden insists that he is entitled to estimate profits by deducting from the total receipts from all sales of coal made prior to April 1, 1906, the operating expenses only. The appellant contends that a further deduction should be made for depreciation in the

value of the mining plant, machinery, tramway, etc., and offered evidence to show the extent of such depreciation prior to April 1, 1906, which evidence was at first admitted and then stricken. Mr. Cook in the 2d vol. of the 6th edition of his work on Corporations, at § 546, p. 1485, discussing profits, says:

"A proper sum must first be expended or set aside for repairs and reconstruction to replace depreciation due to wear and tear. In other words, the fund available for dividends is ascertained by taking into account the cost of repairs and a reasonable allowance for depreciation, giving credit for all actual permanent improvements."

We think this rule should be applied to the operating plant,* but not to the real estate or mine itself, which must depreciate by reason of the constant removal of the coal deposits. In the same section Mr. Cook further says:

"But in the case of a company owning patent rights, or of a mining company whose product when once used can never be replaced, it is not necessary to set aside funds for the purpose of purchasing new patents or a new mine."

In a foot note Mr. Cook makes a quotation from Greene on Corporation Finance, which is especially pertinent here. If the respondent corporation makes dividends on the theory advanced by the respondent Linden, and so continues, it will ultimately become necessary for it to incur indebtedness for a new plant to continue the operation of its mine. The entries made and claimed by the respondent Linden, as profits earned prior to April 1, 1906, were arbitrary, improper, and prejudicial to the appellant. We cannot determine from the record now before us how much credit, if any, he was entitled to receive, as he introduced no evidence on the subject of depreciation after the appellant's evidence, which was competent, had been stricken.

The action of Robert J. Linden and his subservient trus-

*NOTE: The decision on this point appears to be overruled by the concurring opinion of the Chief Justice, *post* p. 180, REP.

tees in raising his salary to $400 per month, was arbitrary and illegal. When Boothe and Linden, as owners of all of the capital stock, agreed upon a salary of $125 to each of them, ratification of their agreement by the board would have been unobjectionable. The raise of Linden's salary was undoubtedly made at his instance and request. The annual meeting of stockholders had just been held, at which every share of stock was represented. If Linden had intended to be fair in demanding additional salary he would have requested action by the stockholders. There is no evidence of his having done so. He permitted the stockholders to adjourn, and immediately caused the holding-over board of trustees, consisting of himself and his two dummies, to make a contract in which he himself was financially interested.

In *Schaffhauser v. Arnholt & Schaefer Brewing Co.*, 218 Pa. 298, 67 Atl. 417, the supreme court of Pennsylvania said:

"The generally accepted rule, applicable to such cases, is that the voting of a salary or compensation to a director, who either is or is not an officer of the board, must be entirely free from fraud, actual or constructive, and that the action is illegal, if it is determined by the vote of the director, or officer, whose salary is thus increased."

The only way in which the respondent Linden's salary could have been increased without his own vote, was by his two dummy trustees who, although trustees in legal form, were entirely subservient to his will. In *Strouse v. Sylvester*, 134 Cal. xx, 66 Pac. 660, it was held that an increase of the salary of an officer of a corporation, made by the vote of trustees subservient to him, was fraudulent and illegal. From all the evidence and circumstances before us, we conclude that Linden's raise of salary was made to divert profits of the corporation to himself, without due regard to the rights of Boothe, and that Linden should account for all salary received by him, in excess of $125 per month. Evidence was offered to show that his services were worth $400 per month. This evidence was contradicted, but, under the circumstances,

we will not enter upon its consideration, the raise having been improperly made in violation of Linden's agreement with Boothe, and without the latter's knowledge or consent.

Enough has been said to show that the respondent Robert J. Linden, by means of his subservient board of trustees, has seized possession of the corporation and all of its business affairs; that he has excluded the appellant from any participation therein; that he is conducting it to suit himself, and directing its policies; that he refused appellant an inspection of the books to which he was entitled; that the stock is equally divided in ownership between the appellant and himself; that a new board of trustees cannot be elected; that bitter enmity and irreconcilable differences exist between the appellant and respondent Robert J. Linden; that no prospect of adjusting these differences seems to exist; and the question now presented for our consideration is whether these conditions justify the appointment of a receiver.

The respondents contend that the corporation is prosperous; that it has refunded to Boothe $2,000 advanced by him towards the installation of the new tramway, and to the respondent Robert J. Linden a much larger sum advanced for the same purpose; that since January 1, 1907, it has paid a dividend of $5 per share; that on October 1, 1907, it had in cash and good accounts $15,000 surplus and undivided profits; that no court of equity will appoint a receiver over a solvent corporation in the control of a governing body legally authorized to transact its business; that there is no statutory authority for such an appointment; and that in the absence of statutory authority, a court of equity cannot, by the appointment of a receiver, dissolve a solvent corporation controlled by a harmonious governing body. In support of these contentions they cite, with others, the following authorities: 10 Cyc. 988; High, Receivers (2d ed.), § 288; 3 Cook, Corporations (5th ed.), § 746; *Wallace v. Pierce-Wallace Pub. Co.*, 101 Iowa 313, 70 N. W. 216, 63 Am. St. 389, 38 L. R. A. 122; *Little Warrior Coal Co. v. Hooper*,

105 Ala. 665, 17 South. 118; *Benedict v. Columbus Const. Co.*, 49 N. J. Eq. 23, 23 Atl. 485; *Edison v. Edison United Phonograph Co.*, 52 N. J. Eq. 620, 29 Atl. 195; *Einstein v. Rosenfeld*, 38 N. J. Eq. 309; *Republican Mountain Silver Mines v. Brown*, 58 Fed. 644; *Miller v. Kitchen*, 73 Neb. 711, 103 N. W. 297; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747.

There is no question as to the correctness of the elementary doctrine urged by the respondents. The authorities mentioned announce sound equitable principles which were applied to the facts there involved and stated. Our statute, Bal. Code, § 5456, subd. 6 (P. C. § 575), authorizes the appointment of a receiver, "When in the discretion of the court, it may be necessary to secure ample justice to the parties." Courts of chancery are organized for the purpose of doing justice and affording equitable relief whenever in good conscience it should be awarded. Would a court of equity in the furtherance of justice and in the exercise of its sound discretion be justified in directing the appointment of a receiver over the respondent corporation, or should the appellant be turned out of court without other relief than a temporary accounting, with the certainty that, while present conditions continue, he will be compelled to return and incur the expense of repeatedly seeking the aid of the chancellor to secure further accountings and protection of his rights as a stockholder? Although the appellant and R. J. Linden each own one-half of the capital stock, the latter is in exclusive possession. He arbitrarily conducts the corporation business, makes book entries, declares or refuses dividends, raises his own salary, retains his subservient trustees in office, and through them performs such corporate acts as he chooses. He and Boothe are not partners, yet their relative position, created by their contract of sale, is kindred to that of partners. Linden has thereby obtained absolute control of $25,000 in value of the appellant's estate, which he is arbitrarily handling without consulting the appellant or

granting him the least consideration. Such a condition is an intolerable one for the appellant, and one that would not be permitted in a partnership. Were their positions changed, Linden would doubtless demand a receiver with as much energy as he now opposes one. If they were partners, a receiver would unquestionably be granted. No rights of creditors, other stockholders, or third parties are here involved. The only real parties in interest are Boothe and Robert J. Linden. As above stated, their position is kindred to that of partners. Present conditions will undoubtedly continue unless a court of equity affords relief. Should they continue? We think not. After a most diligent research we have been unable to find any case similar to this. It is *sui generis*. Its facts distinguish it from *Secord v. Wheeler Gold Min. Co.*, 53 Wash. 620, 102 Pac. 654, cited by respondents. A court of equity in deciding whether a receiver shall be appointed over a solvent corporation must exercise its sound discretion, in view of the particular facts and circumstances presented.

In *State ex rel. Conlan v. Oudin & Bergman Fire Clay Min. & Mfg. Co.*, 48 Wash. 196, 93 Pac. 219, we said:

"The rival stockholders herein seem unable to agree as to the management and control of the corporate affairs. This is the eighth appeal to this court by these parties or those interested in this matter, and we are informed that another appeal is now on the way. As the stock is held entirely by three stockholders, two of whom are husband and wife, considerations do not obtain which might if there were numerous stockholders not directly responsible for the controversy and the present condition of the corporation. We see no reason for not dissolving this corporation which for over four years has been impotent and unable to legally transact any business on account of the controversy and ill-feeling existing between the parties who own each half of the stock."

In the instant case, there is no control of the corporation by a board of trustees, sustained by a majority of the stock, although originally the present board may have been legally elected. In practical operation there is no deliberative board.

R. J. Linden has as full, complete, and dictatorial control as did Oudin in the case cited, and although the corporation here involved is solvent, such a condition is inequitable and should not be permitted. It does violence to the elementary idea that a corporation is to be controlled by a governing board representing a majority of the stock. No majority is in control, nor can it obtain control. The deadlock is complete, absolute, to all appearances permanent, and R. J. Linden arbitrarily controls and manages the estate of Boothe, whose rights are, and should be, equal to his. The following cases, while not exactly parallel, are pertinent, and may be consulted with much profit: *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374; *Sternberg v. Wolff*, 56 N. J. Eq. 389, 39 Atl. 397, 67 Am. St. 494; *Gibbs v. Morgan*, 9 Idaho 100, 72 Pac. 733; *Hall v. Nieukirk*, 12 Idaho 33, 85 Pac. 485, 118 Am. St. 188.

In *Gibbs v. Morgan, supra*, the supreme court of Idaho well said:

"The early doctrine that the affairs of a corporation could not be inquired into except by permission of the attorney general, and that courts of equity should not interfere with the power and authority of the directors of a corporation because that would result in its dissolution has been modified to meet existing conditions. A large part of the business of the world is done through corporations, and it was held in *Columbia Athletic Club v. State*, 143 Ind. 98, 52 Am. St. Rep. 407, 40 N. E. 914, 28 L. R. A. 727, that the courts of equity should adapt their practice as far as possible to the existing state of society, and apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and should not from too strict an adherence to the forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy."

Mr. Cook in § 746 of the 6th edition of his work on Corporations says:

"A receiver will not be appointed at the instance of a stockholder, even though mismanagement is charged, there

being no fraud, and no danger of insolvency. There is a limit, however, to this rule. The powers of courts of equity to appoint receivers are very broad. Thus a court of equity has power to appoint a receiver where there is such fraud or dissension as to make it impossible for the corporation to carry on its business honestly and to the advantage of its stockholders. Such receivership, however, will be granted only in extreme cases and will be limited in time and extent, so far as the circumstances will permit.

"There are numerous cases to the effect that the court will appoint a receiver where it is evident that a continuation of the business will be impracticable or inequitable. The supreme court of Missouri has said: 'That solvent corporations are wrecked for purely selfish and illegal purposes, that minority interests are "frozen out," that business immorality has run amuck under the assumption that courts are powerless, is too true. But the assumption is wrong. Judicial hesitancy does not mean judicial atrophy or paralysis'."

While we recognize and adhere to the doctrine that a court of equity should hesitate before appointing a receiver over a solvent corporation, and should make such an appointment in exceptional instances only, yet we are constrained to hold that equity, good conscience, justice, and the rights of the parties demand such an appointment in this case. The judgment is reversed, and the cause remanded with instructions to appoint a temporary receiver for such period as the trial court may fix, within which the differences between the parties may be adjusted by themselves if possible. It is further ordered that if, at the expiration of such time, their differences be not adjusted, a permanent receiver be appointed. It is further ordered that an accounting be had, that R. J. Linden be required to return to the corporation all salary drawn by him in excess of $125 per month, and all profits withdrawn by him in excess of the amount to which he was entitled, as having been earned prior to April 1, 1906. The appellant will recover his costs on this appeal, from the respondent Robert J. Linden.

MOUNT, FULLERTON, and DUNBAR, JJ., concur.

RUDKIN, C. J. (concurring)—I concur in the opinion of Mr. Justice Crow, except in his interpretation of the word "profits" found in the written contract or receipt of May 19, 1906. In referring to the profits accruing prior to the 1st day of April, 1906, I am convinced that the parties understood and meant that which would remain after deducting the cost of operation from the income of the mine, and that no deduction or allowance for depreciation in the value of the plant or machinery was contemplated or intended. The property of the corporation was represented by its capital stock, and the plaintiff purchased the property or its representative as he found it. Profits and dividends are not necessarily synonymous terms. *Allegheny v. Pittsburgh etc. R. Co.*, 179 Pa. St. 414, 36 Atl. 161. But regardless of technical definitions, it is the duty of the court to ascertain the intention of the parties from their language and all the surrounding circumstances, and it is very apparent to my mind that no technical definition of the term profits was here intended.

GOSE, CHADWICK, PARKER, and MORRIS, JJ., concur with RUDKIN, C. J.

[No. 7841. *En Banc.* October 5, 1909.]

THOMAS F. BRAZELL *et al.*, *Appellants*, v. THE CITY OF SEATTLE *et al.*, *Respondents*.[1]

MUNICIPAL CORPORATIONS — STREETS — VACATION — HEARING—CONTINUANCE. A city council having obtained jurisdiction, by petition and notice, to vacate a street, jurisdiction is not lost by postponing the hearing without entering a continuance to a day certain or giving notice of the time.

SAME—POWER TO VACATE—PROCEDURE. City councils have no power to vacate streets except as delegated by the legislature, and the procedure therefor must be strictly followed.

SAME—REPLATS—POWER TO MODIFY — STATUTES — CONSTRUCTION. Under Laws 1903, p. 139, authorizing street vacations and replats,

[1]Reported in 104 Pac. 155.

upon the filing of a replat, "accompanied with a petition for the change desired" by three-fourths of the owners, which the council may approve or reject, and "assess damages or benefits, award the same and make such order in the premises as justice and the public welfare may require," the council has no power to modify the proposed replat, but must approve or reject it in its entirety, and an order approving part of the vacation petitioned for is void.

SAME—REPLATS—POWER TO MODIFY—STATUTES. Laws 1903, p. 139, requiring a proposed replat for street vacations to be filed showing the changes petitioned for by three-fourths of the owners, and giving the city council complete jurisdiction to inquire into and determine the merits, assess damages or benefits, award the same, and make orders required by justice and the public welfare, the city council can only approve or reject the petition in its entirety, and an order altering the proposed replat is void; the orders required by justice, etc., referring to the necessary assessments and awards, and not to modifications of the replat.

EMINENT DOMAIN—USE OF STREETS—RIGHT OF ABUTTERS—COMPENSATION. An abutting owner cannot be deprived of his right to the use of the full width of the street without just compensation.

SAME—RIGHTS OF ABUTTERS—INJUNCTION—SPECIAL INJURY. An abutting owner deprived of his right to the use of the full width of the street immediately in front of his lot, by a void order vacating a portion of the street, is specially injured and may maintain an action to enjoin the proceeding, but only so far as it affects his property.

SAME — IMPROVEMENTS — ASSESSMENTS—REMEDY BY APPEAL—INJUNCTION. Where a city council had jurisdiction to approve or reject a petition for a replat, and to assess damages or benefits, the remedy for illegal assessments upon a void order modifying the replat is by the appeal provided by the city charter, and not by injunction.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 23, 1908, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the vacation and improvement of certain streets. Reversed.

Wright & Kelleher and *Wright & Kent*, for appellants.

Scott Calhoun, *Howard A. Hanson*, and *Oliver C. McGilvra*, for respondents.

Crow, J.—This action was commenced by Thomas F. Brazell and Laura J. Brazell, his wife, against the city of Seattle, D. Lambert, and A. C. Goerig, to annul, declare invalid, and enjoin certain proceedings taken and threatened by the city for the vacation of certain streets, the platting of other streets in lieu thereof, and the grading and improving of streets shown by the replat. The defendants interposed general and special demurrers, which were sustained upon the sole ground that the amended complaint did not state a cause of action. The plaintiffs declined to plead further; whereupon the action was dismissed, and they have appealed.

The question presented by this appeal is the sufficiency of the amended complaint. Its allegations in substance are, that the appellants and the respondent Lambert are respectively owners of certain lots in the city of Seattle abutting upon opposite sides of East Aloha street, which runs east and west between Thirty-ninth avenue north and Fortieth avenue north, appellants being located on the north side of East Aloha street; that in August, 1903, the appellants, Lambert, and many others owning lots in the same locality, conceived a scheme for vacating numerous streets and alleys therein, and dedicating others in lieu thereof; that in furtherance thereof they prepared a proposed replat of the locality, including the portion of East Aloha street above mentioned, together with a petition to the city council in favor of the replat, which petition, at the instance of the respondent Lambert, and others associated with him, was signed by the appellants and by three-fourths in number and area of the owners of all the property lying within the district; that the petition was filed with the city, and notice given that the same would be heard on October 19, 1903; that the hearing was adjourned until November 30, 1903, on which latter date no adjournment was made; that on December 7, 1903, the council again considered the petition and made a further adjournment until February 14, 1904, on which latter date it, without notice, adopted the report of its street committee in favor

of granting the prayer of the petition; that no further action was taken until May 14, 1906, when the city council, without further notice, passed Ordinance No. 13,773, which purported to carry out the terms of the petition and adopted the replat, subject to the change that instead of vacating all of East Aloha street between the property of the appellants and the respondent Lambert as prayed, it vacated the south half thereof which abutted upon the property of Lambert, thus leaving the street open upon appellants' side, but closing it upon the opposite side; that the change was fraudulently procured by Lambert for the purpose of injuring appellants and benefiting himself, as he would thereby acquire title to the vacated portion of the street and still retain for his convenience an open street on the opposite side adjoining the appellants' lots; that the respondent Lambert, claiming title to the vacated portion of East Aloha street, is about to take possession thereof to appellants' special injury and damage; that appellants had no knowledge of the proposed passage of the ordinance adopting the replat, or the variance of its terms from the replat proposed by the petition, until November, 1906; that the ordinance, in addition to providing for the vacation of certain streets, also provided for the dedication of others in lieu thereof in the district and locality affected by the street vacations; that in June, 1908, the city council passed Ordinance No. 18,665, providing for the improvement of the replatted system of streets, and providing that the vacated portion of East Aloha street, adjacent to the premises of respondent Lambert, be not graded; that pursuant to such ordinance, the city and the respondent Goerig, as contractor, are about to regrade and improve the replatted streets, including the nonvacated portion of East Aloha street; that the city is about to assess the real property in the district in question, including appellants' property, to pay the expenses of such improvements; that the pretended Ordinance No. 13,773, and the contract of the city with Goerig, are each null and void; that the assessments will be null

and void and a cloud upon appellants' title; that by reason of such illegal vacation, replat, improvement, and threatened assessment the appellants will suffer irreparable damages, unless the same are enjoined; and that appellants' injury will be special and peculiar to them. An injunction was demanded, permanently restraining the respondents from proceeding with the improvements under Ordinance 18,665, from levying any assessments therefor, from treating East Aloha street as vacated, and particularly restraining the respondent Lambert from taking possession of any portion of East Aloha street or claiming the same as his private property.

The appellant contends (1) that the city council, after a petition for vacation is filed, cannot act upon the same without notice and independently of the date fixed for the hearing; (2) that it cannot vacate streets otherwise than in accordance with the terms of the petition; and (3) that in any event its action can be enjoined as fraudulent. The respondents contend that three questions are involved in this appeal, as follows: (1) Have appellants such an interest in the replat proceedings that they can in a collateral attack secure the annulment of the entire proceedings except as to the portion of East Aloha street abutting upon their property? (2) can appellants in this proceeding annul the vacation of any portion of East Aloha street vacated under Ordinance 13,773? and (3) will an injunction lie to restrain the city from improving the public portion of East Aloha street and assessing the cost of such improvement against private property specially benefited thereby.

The amended complaint affirmatively shows that proper notice fixing a time for the hearing of the petition was given; that several continuances were entered, but that on one occasion no continuance was entered although the council considered the petition at its next meeting without further service. The council obtained jurisdiction of the petition by virtue of the original notice, but the appellants now contend that, having once failed to order any continuance, it lost jurisdiction

so completely as to render its subsequent orders void. This contention cannot be sustained. Mr. Elliott, in § 293 of the second edition of his work on Roads and Streets, discussing this question, says:

"The sound doctrine upon this subject, as it seems to us, is this: If the parties are once properly in court then the failure to take action at the proper time will not oust the jurisdiction, although it may constitute error reviewable by *certiorari* or on appeal. This is in harmony with the general principle that where jurisdiction has once attached it is not lost by an error committed in the course of the proceedings. The general rule unquestionably is that when jurisdiction is acquired, the order or judgment is not void, although it may be erroneous."

Power to vacate streets and highways is vested in the legislature, and may be delegated by it to municipalities, which has been done in this state. There is in a city council no inherent power to vacate streets, and when such power has been delegated to it by the legislature the procedure therefor which the statute provides must be strictly followed. The procedure here adopted was that prescribed by chapter 92, Laws 1903, page 139, the first section of which provides for the preparation of the proposed replat, together with a specified petition for its adoption by the city council. Sections 2 and 3 provide for notice or process and its service. Section 4 reads as follows:

"That thereafter such board of county commissioners, or city council shall have full and complete jurisdiction to inquire into and determine the merits of the changes or relief prayed for, assess damages or benefits, award the same and make such order in the premises as justice and the public welfare may require."

From a careful consideration of this statute, we conclude that the petition and notice only conferred upon city councils authority to approve and adopt or disapprove and reject the identical plat presented. By §1 it is required that the proposed replat be drafted upon a copy of the existing plat,

which must be "accompanied with a petition for the change desired;" that is, for the change indicated on the replat and desired by the petitioners; not for some other changes which the council may desire. If the proposed plat and petition do not meet the approval of the city council, they are at liberty to reject them entirely, in which event the original plat will continue without modification.

In *State, Condict. v. Ramsey*, 65 N. J. L. 503, 47 Atl. 423, the supreme court of New Jersey said:

"It is objected that it was not lawful for the surveyors to return, or for the freeholders to confirm, a vacation less extensive than that applied for. This objection must prevail. Vacation rests on the same power and procedure as the laying out of roads, and it has been often adjudged by this court that the application is controlling in this regard. A material variance from the application will vitiate the return. *State v. French*, 24 N. J. Law 736; *Powell v. Hitchner*, 32 N. J. Law 211; *Freeman v. Price*, 63 N. J. Law 151, 43 Atl. 432. The surveyors can no more vacate part of the road of which complete vacation is sought than they can lay out a road differing materially from the application upon which they act. The application to vacate may be limited to a part of a road (*State v. Bassett*, 33 N. J. Law 26), but the vacation cannot lawfully be less extensive than the application."

We think this the correct rule to be applied to the instant case. If the council when acting upon the petition could, upon their own initiative, change the vacation of one street on the proposed replat, there would be no limitation upon their power to change many others, which might result in the preparation and adoption of a replat other than the one petitioned for. While we will not inquire into the motives which actuated the appellants when they signed the petition, it may well be imagined that they might have been willing to endure the inconvenience of submitting to the entire vacation of East Aloha street, opposite their lots, in exchange for the benefit to be derived by them from the title which they would acquire to the north half of the portion of the street so vacated, and which they might have regarded as ample com-

pensation for their damages sustained. They have recovered no compensation for any damages they have sustained by the vacation of the south half, and the narrowing of the street immediately in front of their lots.

Respondents, citing §4 of the statute, contend that the petition and the notice conferred complete jurisdiction upon the council to make such order in the premises as justice and the public welfare may require, and that they were authorized, in pursuance of such authority, to vacate a less portion of the street than the petition requested. To confer jurisdiction upon the council, the petition of three-fourths in number and area of the owners was required. The proposed replat may take or damage property not only of the petitioners, but also of others in the district who have not petitioned, and their property could not be so taken or damaged without compensation. Const. art. 1, § 16. The legislature to meet this condition, by §4 authorized the assessment of damages and benefits, and the words "make such order in the premises as justice and the public welfare may require," used in §4, undoubtedly refer to such necessary assessment of damages and benefits, and were not intended to confer authority upon the city council to first modify the proposed replat and then adopt it as modified. Our conclusion therefore is that the city council had no jurisdiction to make an order vacating a portion only of East Aloha street, where its entire vacation was petitioned, and that its order making such partial vacation is void.

The appellants, as the owners of lots abutting on the portion of East Aloha street partially vacated and narrowed, suffered special injury and damages, different in kind and not simply in degree, from that suffered by the public in general, and are entitled to maintain this action to enjoin such vacation. The right of the owner of a city lot to use the adjoining street to its full width is well established, unquestioned, and one of which he cannot be deprived without just compensation. It is as much a property right as the

lot itself. In *Dantzer v. Indianapolis Union R. Co.*, 141 Ind. 604, 39 N. E. 223, 50 Am. St. 343, 34 L. R. A. 769, the supreme court of Indiana, quoting from its previous decisions and commenting thereon, says:

"At least two cases in this state have defined the extent of that appendant property right of access. In *Haynes v. Thomas*, 7 Ind. 38, it is said: 'These decisions establish the principle that besides the right of way which the public has of passage over a street in a town or city, there is a private right which passes to the purchaser of a lot upon the street, and as appurtenant to it, which he holds by implied covenant that the street *in front of his lot* shall forever be kept open to its full width.' In the case of *Tate v. Ohio & R. R. Co.*, 7 Ind. 479, the court quotes the above passage from the case of *Haynes v. Thomas supra*, and says, in application of the principle to the facts of the case, that 'the person, whether natural or artificial, causing the obstruction, is liable to the owners of the adjoining lots for the injury. It is thus carefully limited to those owning lots *fronting on the street* at the point of obstruction. That is the case made in the record. *Such owners only seem to sustain special injury.*' These cases, and probably others in this state, hold that this property right cannot be taken or obstructed, even with legislative sanction."

Abutting owners who are deprived of the right to enjoy the street to its full width immediately in front of their property, being specially injured, are entitled to equitable relief by injunction. The ordinary and well-established rule that owners who are only remotely affected or who sustain no special injury different from that sustained by others in the vicinity, are not entitled to equitable relief, does not apply to them, nor does it deprive them of their right to seek protection in their individual capacity.

There are no allegations in the amended complaint sufficient to show that as to any other streets vacated or changed by the replat, the appellants are injured in any manner other than as the public in general may be injured. This being true, they are in no position to enjoin such vacation in this action. *Ponischil v. Hoquiam Sash & Door Co.*, 41

Wash. 303, 83 Pac. 316; *Symons v. San Francisco*, 115 Cal. 555, 42 Pac. 913, 47 Pac. 453.

As to the threatened assessments, the appellants should seek their remedy by the usual course of appeal provided by the city charter and the statutes of the state. The amended complaint states a cause of action sufficient to entitle the appellants to an order of injunction restraining the partial vacation and narrowing of East Aloha street in front of their property.

The judgment is reversed, and the cause remanded with instructions to overrule the demurrer.

RUDKIN, C. J., DUNBAR, MOUNT, and GOSE, JJ., concur.

[No. 7952. Department Two. October 5, 1909.]

PETER SANDBERG, *Appellant*, v. IRA D. LIGHT *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—LEASE—SURRENDER—DISCLAIMING INTEREST. A lease with option to purchase is shown to be abandoned and mutually surrendered, where on the insolvency of the lessee, its president acquired the lease by assignment and removed the buildings, and in an action by the lessors to enjoin the removal of the buildings, the assignee filed an answer disclaiming any interest in the lease, whereupon the lessors abandoned the suit, relying on the answer as a surrender, retook possession, and refused subsequent tenders of rent.

SAME—OPTION TO PURCHASE—RIGHT TO EXERCISE—CONTINUANCE OF LEASE. An option to purchase, contained in a lease with renewal privileges, expires on any termination of the lease, without any express stipulation that time is of its essence, the continuance of the lease being essential to the option.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 7, 1908, upon findings in favor of the defendants, after a trial on the merits before

[1]Reported in 104 Pac. 205.

the court without a jury, in an action for specific performance. Affirmed.

Bates, Peer & Peterson, for appellant.

J. W. A. Nichols, for respondents.

Crow, J.—Action by Peter Sandberg against Ira D. Light and Sarah L. Light, his wife, to enforce the specific performance of a contract to convey real estate. From a judgment of dismissal, the plaintiff has appealed.

The appellant predicates his assignments of error on findings made and refused. The evidence shows that on April 29, 1903, the respondents executed and delivered a written lease on certain lots in Steilacoom, Pierce county, Washington, to the Tacoma Wood Distilling Company, a corporation, for the term of three years, with the privilege of two additional years, at the annual rental of seventy-five dollars, payable in advance on the 1st day of May in each year; that the lease contained the following option:

"It is further stipulated and agreed by and between the parties hereto that the Tacoma Wood Distilling Company, a corporation, may at its option purchase the above described premises, and the said lessors agree to sell the above described premises to the lessee if it desired to buy, upon the following terms and conditions; at the termination of the first year of said lease, at its option, the Tacoma Wood Distilling Company may purchase the said property for the sum of one thousand dollars ($1,000); at the termination of two years (2) the said lessee, the Tacoma Wood Distilling Company, may purchase the said premises for one thousand two hundred and fifty dollars ($1,250); at the termination of three years (3) the said lessee, the Tacoma Wood Distilling Company, may purchase the said property for the sum of one thousand five hundred dollars ($1,500); at the termination of five years after the date hereof, the said Tacoma Wood Distilling Company may purchase said premises for the sum of two thousand dollars ($2,000)."

The appellant claims to have succeeded by mesne conveyances to the rights of the lessee, including the option to pur-

chase. The trial court found that the Tacoma Wood Distilling Company paid the first year's rent in advance and took possession; that it forthwith erected on the lots certain buildings, machinery, and fixtures, for the manufacture of creosote, turpentine, wood alcohol, and other products, and engaged in that business; that it thereafter became insolvent; that its receiver duly appointed did, on June 4, 1904, under an order of the superior court, sell all of its property, including the buildings, machinery, and lease, to one Max Webber, who assigned the same to appellant; that appellant took immediate possession; that on June 6, 1904, he paid respondents $75 for rent to May 1, 1905; that on May 18, 1905, he commenced to remove the machinery, building, and fixtures, and completed such removal on June 5, 1905; that on May 27, 1905, he tendered the respondents $75 for rent to May 1, 1906, which tender they refused; that on April 26, 1905, the respondents Ira D. Light and Sarah L. Light, his wife, commenced action No. 24,031, in the superior court in and for Pierce county, against the Tacoma Wood Distilling Company, a corporation, Peter Sandberg and Max Webber, to enjoin the removal of the buildings and improvements; that paragraph 3 of their complaint contained the following allegation:

"That the defendants Peter Sandberg and Max Webber claim to own some interest in said lease [referring to the lease in controversy] by assignment or otherwise . . .";

that on May 26, 1905, Peter Sandberg, the appellant herein, served, in cause No. 24,031, his answer which contained the following denial:

"Answering paragraph 3 of said complaint defendants deny that defendants Sandberg and Webber claim to own some interest in said lease . . .";

that Ira D. Light claims he accepted and considered said answer as an intention on the part of Sandberg to abandon the lease, and leased premises, and that he took no further steps to obtain an injunction; that between April 21 and

26, 1906, the appellant again tendered the respondents $75 for the year ending May 1, 1906, which tender they again refused; that on May 5, 1906, he tendered them $150 rent for two years, from May 1, 1905, and also tendered them $1,500 as purchase price for the premises under the option of the lease, and demanded a deed; that these tenders were also refused; that on the trial of this action, which occurred in November, 1908, the appellant, by his counsel, stated that, if the court found $2,000 purchase money should have been tendered, he stood ready and willing to pay the same, and that he would do so; that early in the summer of 1906, the respondents erected a fence upon the premises inclosing a portion thereof, which they plowed and planted with potatoes and other garden products; that the premises have not since been cultivated or occupied, and that the fence has been removed and destroyed.

The appellant contends that the tenders of $150 and $1,500, which the court found to have been made on May 5, 1906, were in fact made on April 26, 1906; but the finding made is sustained by the evidence. This being true, the tenders mentioned were made after the three-years' lease had terminated, and no evidence was produced to show that the lease was ever renewed or extended for the additional two years, or that appellant demanded its extension when he made his last tender of rent. On the contrary he demanded a deed.

Appellant has at great length discussed the law of tender, contending that his tender of the purchase money was sufficient and timely; that it was unnecessary, the respondents having refused to convey, and that respondents, who stated no specific objections to the amount of the tender, or the time when it was made, are now in no position to question its sufficiency. We consider it unnecessary to discuss the law of tender, having concluded that the lease was abandoned by the appellant; that it was mutually terminated by act of the parties; that the appellant, by the denial of his answer, in-

duced the respondents to refrain from prosecuting action No. 24,031, in which they sought an injunction, and that he is now estopped from claiming that the lease was thereafter valid, or that he is now entitled to a specific performance of the contract to convey.

The controlling questions before us are questions of fact. It will serve no good purpose to enter upon a detailed discussion of the evidence, which we hold is sufficient to support the final judgment. When the lots were originally leased they were vacant. The lessee corporation forthwith installed the manufacturing plant, and soon became insolvent. Appellant was its president and also a heavy stockholder. He acquired the lease and improvements at the receiver's sale, and thereafter paid the second year's rent, which was accepted by respondents. Near the commencement of the third year he was about to remove the buildings, when respondents instituted an action to enjoin him. It was after he made his answer therein, disclaiming any interest in the lease, that he tendered the rent for the third year ending May 1, 1906. The respondents, relying upon his answer, not only refused to accept the rent, but also refrained from further prosecuting their action for an injunction, and permitted the appellant to remove the buildings without further molestation. Appellant took no further action until April 21, 1906, when he again tendered the third year's rent, then almost one year in default. He evidently made this tender to induce some recognition of the lease by respondents, so that he might renew it and exercise his option to buy.

The undisputed facts clearly indicate an abandonment of the lease by appellant and its surrender by both parties, which surrender, although not formally executed, was valid in law. There is nothing to show that appellant ever claimed the privilege of the two-year's extension contemplated by the original lease. On the contrary, after the original three years' lease, and his option thereunder—if not forfeited—

had expired, he on May 5, 1906, made a tender of $1,500 purchase money, and now seeks to enforce specific performance. A continuance of the lease was essential to a continuance of the option. In other words, if the lease was at any time terminated, the option to purchase ceased and could not be thereafter exercised. The lease was terminated, it being shown that appellant, by his pleadings in the injunction proceeding, estopped himself from claiming its further continuance; that by the mutual acts of the parties it was abandoned; that it had expired at the end of the three years, and that no renewal or extension was obtained. It will thus appear that, under any phase of the case, appellant's option to purchase had expired on or prior to May 1, 1906. He made no tender of the purchase money, nor did he attempt to exercise his option at any time prior to May 5, 1906, which was too late. In *Neeson v. Smith*, 47 Wash. 386, 92 Pac. 131, this court said:

"The agreement involved in this action being a contract for an option, the appellant had no rights thereunder after the expiration of the two years, unless he had, within that time, elected to take the property, had tendered the purchase money, and had demanded a deed, which it is not contended he did. The authorities generally hold that time is material in a contract for an option, and that it is not necessary to expressly stipulate that it shall be of its essence."

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 7793. Decided October 5, 1909.]

SPRING WATER COMPANY, *Appellant*, v. TOWN OF MONROE, *Respondent*.[1]

COUNTIES — FRANCHISES — LEGISLATIVE VALIDATION — HIGHWAYS. Laws 1905, p. 210, §§ 2, 3, validating franchises granted by the county commissioners to use county roads or highways "outside the limits" of incorporated cities or towns, to the extent that such roads have been actually occupied prior to the passage of the act, refers to grants made outside of city limits at the time of the attempted grant, and is not limited to franchises granted in territory still under control of the county commissioners at the time of the passage of the act (CROW, J., dissenting).

STATUTES—RETROACTIVE LAWS—CURATIVE ACTS—MUNICIPAL CORPORATIONS—COUNTIES—FRANCHISES. The legislature has power to pass a retroactive curative statute which validates the *ultra vires* county grant of franchises in public roads outside of the limits of a city, actually occupied, although the territory has since become incorporated as a town of the fourth class.

MUNICIPAL CORPORATIONS — INCORPORATION — EFFECT—CONTROL OF STREETS—PRIOR FRANCHISES. A town upon its incorporation does not acquire any such vested right to the control of its streets in virtue of its authority over streets, granted by Bal. Code, § 1011, as would prevent the legislature from legalizing prior franchises.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered May 9, 1908, upon sustaining a demurrer to the complaint, dismissing an action to enjoin a town from interfering with a water system belonging to the plaintiff. Reversed.

Blaine, Tucker & Hyland, for appellant.

Cooley & Horan, for respondent.

PER CURIAM.—Action by Spring Water Company, a corporation, against the town of Monroe, a municipal corporation, to enjoin and restrain the defendant from tearing up or interfering with water pipes belonging to the plaintiff.

[1]Reported in 104 Pac. 202.

A demurrer being sustained to the complaint, the plaintiff declined to plead further, the action was dismissed, and the plaintiff has appealed.

The only question before us is the sufficiency of the complaint. It alleged, that on June 17, 1901, the commissioners of Snohomish county granted to the appellant a franchise for fifty years, to lay down and maintain water mains and pipes along, across, over and under all streets and alleys in Monroe and Tyee city, and other highways in Snohomish county; that pursuant to, and under the authority of, the franchise, the appellant immediately commenced operations, and laid pipes in the streets and alleys of Monroe, doing so with the knowledge and approval of its inhabitants and of the county commissioners; that Monroe was incorporated as a town of the fourth class in January, 1903; that in 1905 an act of the legislature of Washington entitled, "An Act giving to County Commissioners the power to grant certain public utility franchises on county roads and streets outside of incorporated towns and cities, and confirming certain such grants heretofore made," was passed, and was approved by the governor on March 9, 1905 (Laws 1905, p. 210, ch. 106); that the territory and jurisdiction of the town of Monroe now extends over lands and streets mentioned and included in the franchise; that the council of the town of Monroe, on April 8, 1906, adopted a resolution directing appellant to discontinue the maintenance of its water system, and that unless it be restrained by order of court, it will tear up and remove appellant's water pipes, destroy its business, and cause it irreparable damage.

In *State ex rel. Spring Water Co. v. Monroe*, 40 Wash. 545, 82 Pac. 888, the act of the county commissioners in attempting to grant the identical franchise pleaded in this action was held to have been *ultra vires* and void. It appears from the pleadings, however, that the appellant had, at an outlay of $3,500, laid pipes and mains in the streets and alleys of the present town of Monroe before its incorpora-

tion. Pending that litigation and with evident intent to cure the like acts of the commissioners in the several counties in the state, the legislature passed the act of 1905; the particular parts of which affecting our present inquiry are found in sections 2 and 3, and are as follows:

"That any and all grants, rights, privileges, franchises or powers heretofore made or attempted to be made, given or granted by the board of county commissioners of any county in this state, when such board was in regular or special session, and when the action of such board is shown by its records, to any person or corporation, . . . to lay or maintain pipes for the distribution of water, or gas, in, upon, along, through or over public roads and highways, or any public road or highway, outside the limits of incorporated cities and towns, be and they are hereby confirmed and declared to be valid to the extent that such road or highway has been, prior to the passage of this act, actually occupied by the *bona fide* construction and operation of such utility and no farther.

"Said rights, powers and grants so made or attempted to be made and hereby confirmed, shall have and be of the same force and effect as if the county commissioners in any county of this state, prior to the time of giving or granting said rights, privileges and franchises, had been specifically authorized and empowered to give and grant the same." Laws 1905, p. 210, §§ 2, 3.

It is contended by respondent that, (1) the intent of the act was to limit the territory over which the ratification is to extend, to territory outside of cities and towns; and, (2) the town of Monroe having been incorporated subsequent to the attempted grant, that the act of the legislature is ineffectual to attain the object sought, if the legislative intent were otherwise. As viewed by a majority of the court, the act is too plain for construction. It provides that any and all franchises theretofore made or attempted to be made, given or granted by the board of county commissioners, to lay or maintain pipes for the distribution of water along through or over any public road or highway outside of the limits of incorporated cities and towns are declared to be

valid, to the extent that such road or highway has been *prior to the passage of the act* actually occupied. Its evident purpose was to protect investments made and property acquired in good faith under an *ultra vires* order of the county commissioners. The words "outside the limits of incorporated cities and towns," must then be held to refer to the time of the attempted grant, and to cover the acts of the grantee to the extent to which it has exercised the power attempted to be granted, and not to the date of the validating act. Otherwise the act of 1905 was a vain and useless thing, in so far as cities and towns were concerned, and all reference to them is an idle expression carrying no weight to extend or limit the operation of law. To give the act any other construction would necessitate the rejection of the words quoted altogether. This the courts cannot do arbitrarily. It is the duty of the court to give effect, if possible, to every word and phrase of an act when it is challenged.

The real question, therefore, is the power of the legislature to pass a curative act which will relate back and validate the occupation of a road or highway, which is afterwards, and before the passage of the act, included within the limits of an incorporated town. Respondent puts particular reliance upon the opinion of Chief Justice Dixon in *Hasbrouck v. Milwaukee*, 13 Wis. 42. In that case it was held that a void contract could not be validated by an act of the legislature as against the consent of a city. That case has no application here. The right of the town to contract is not impaired, nor does it suffer any unwarranted burden. The municipality was organized subject to property rights then existing or which the legislature might by general law thereafter recognize or create. Curative laws are not discountenanced because they are retroactive. Upon this point the authority relied upon has become a leading case in Wisconsin. As was said in *Richland County v. Richland Center*, 59 Wis. 591, 600:

"There is no constitutional inhibition against the passage

of retrospective laws as such. The only question in such case is whether the legislature intended them to have a retroactive effect, and, if so, such effect is given to them by the courts. The objection in respect to such laws is not because they are retroactive, but that they disturb vested rights or impair the obligation of contracts which were acquired or assumed under them and dependent upon them. In such cases they are invalid, not because retroactive, but on other constitutional grounds."

In that case the village had purposely failed to pay over certain moneys collected for liquor licenses, and which under existing laws should have been paid to the county for the support of the poor. An act was subsequently passed legalizing such conduct on the part of all offending boards, trustees, and city councils. The trial court held that the county had such a vested interest in the fund that the legislature could not take it away. Upon appeal the case was reversed, the court holding, *inter alia*, as above indicated.

Towns and cities are created by the authority of, and are subject to, the will of the legislature. If it could have authorized the act of appellant in the first instance by appropriate legislation, it can, by a subsequent act, ratify and confirm the *ultra vires* act of the commissioners, and thus preserve rights of property.

Judge Stiles in *Baker v. Seattle*, 2 Wash. 576, 27 Pac. 462, says that it is a principle long sustained by the courts, "that where a municipal corporation has done an act beyond its statutory powers, but within the powers which it was competent for the legislature to have conferred upon it, the act may be validated by a curative statute." The validity of such acts have been frequently upheld by this court. *Holmes & Bull Furniture Co. v. Hedges*, 13 Wash. 696, 43 Pac. 944; *West Seattle v. West Seattle Land and Imp. Co.*, 38 Wash. 359, 80 Pac. 549; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *State ex rel. Latimer v. Henry*, 28 Wash. 38, 68 Pac. 368; And, also, *Pullman v. Hungate*, 8 Wash. 519, 36 Pac. 483; *State ex rel. Hemen v. Ballard*,

16 Wash. 418, 47 Pac. 970; *Abernethy v. Town of Medical Lake*, 9 Wash. 112, 37 Pac. 306, in which the several municipalities were charged under the act of 1893 with obligations incurred by the antecedent void incorporation.

It cannot be held, as it seems to have been assumed, that the town of Monroe acquired upon its organization any vested right to the control of its streets in virtue of § 1011 of Ballinger's Code (P. C. § 3524). It is elementary that what is given by statute may be taken away by statute.

" 'It is an unsound and absurd proposition, that political power conferred by the legislature can become a *vested right*, as against the government, in any individual or body of men. It is repugnant to the genius of our institutions, and the spirit and meaning of the constitution, for by that fundamental law all political rights not then defined and taken out of the exercise of legislative discretion were intended to be left subject to its regulation. If corporations can set up a vested right against the government to the exercise of this species of power, because it has been conferred upon them by the *bounty* of the legislature, so may any and every officer under the government do the same.' It is competent for the legislature to transfer the control of the streets even to a body foreign to the corporation, and the moneys to repair the same. 1 Dillon on Mun. Corp., 292; *Bristol v. New Chester*, 3 N. H. 524; *Benson v. Mayor of New York*, 10 Barb. 223; *People v. Walsh*, 96 Ill. 232." *Richland County v. Richland Center, supra.*

Our conclusion is that the act is vital to preserve the property of appellant, and that the town of Monroe must exercise its general powers subject to the right of appellant to maintain its water system as it is now maintained in the streets of the town, subject of course to such reasonable regulations as may now or hereafter be enacted by the town council. The rights of all municipalities affected by the act of 1905 are, as is most aptly stated by Chancellor Kent, "deemed to have vested subject to the equity existing against them and which the statutes have recognized and enforced."

The judgment of the lower court is reversed, and this

cause remanded with instructions to overrule the demurrer to appellant's complaint.

Crow, J. (dissenting)—I dissent from the majority opinion. The act of 1905, on which appellant relies, fixes and limits the territory over which ratification is to extend. Its manifest purpose is to validate franchises within territory over which the commissioners still retain jurisdiction, and relieve the grantees and holders of void franchises from the necessity of making further application to the county commissioners for their renewal or validation. At the time of the passage of the act, the jurisdiction of the county commissioners over the streets and alleys of Monroe had been terminated by the incorporation of the town, and it would seem that the words "outside the limits of incorporated cities and towns" were only intended to apply to roads, alleys, and highways still under the jurisdiction and control of county commissioners at the date of the passage of the act, and to exclude those then within the territory of any such municipality, although outside at the time of the granting of the original void franchise. To adopt any other construction would be to withdraw from the town council a portion of its power and authority conferred by Bal. Code, § 1011 (P. C. § 3524), and deprive them of that complete authority over the streets, alleys, and highways within the municipality granted by that section.

I am of the opinion that the act did not validate the appellant's void franchise as to any street, alley, or highway, which at the date of its passage was within the municipal boundaries of the town of Monroe. When the town was incorporated, appellant was occupying a portion of its streets without legal right or authority. The complete jurisdiction of the town at that time extended by operation of law over all such streets freed from the burden of any franchise or rights asserted by the appellant, and this court should not hold that the act in question afterwards imposed any such burden, without the consent of the municipal authorities, unless it was

the clear and manifest intention of the legislature that such a condition should result. The use of the words "upon highways *outside* of the limits of incorporated towns, . . . are hereby confirmed and declared to be valid," precludes us from adopting any such construction.

The judgment should be affirmed.

[No. 8044. Department Two. October 5, 1909.]

B. SCHADE BREWING COMPANY, *Appellant*, v. FALLS CITY PICKLE WORKS *et al.*, *Respondents*.[1]

WATERS AND WATER COURSES—DRAINS—SEVERANCE OF OWNERSHIP—COVENANTS—DOMINANT AND SERVIENT ESTATES. Where the owner, for his own convenience, constructed a drain across two lots to an outlet, and afterwards conveyed the dominant and servient estates to different parties by warranty deed, no obligation rests upon the grantee of the dominant estate to remove or close the drain, but the burden thereof rests upon the grantee of the servient estate.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered February 8, 1909, upon granting a nonsuit at the close of plaintiff's case, dismissing an action to enjoin the maintenance of a drain, and for damages. Affirmed.

H. M. Stephens, for appellant.

L. L. Westfall, for respondent Falls City Pickle Works.

Graves, Kizer & Graves, for respondent Spokane & Inland Empire R. Co.

L. R. Hamblen, *F. D. Allen*, and *Harry A. Rhodes*, for respondent City of Spokane.

PER CURIAM.—For some time prior to the year 1902, Cyrus Happy was the owner of blocks 17 and 18 in one of the additions to the city of Spokane. There was a pond on

[1]Reported in 104 Pac. 175.

block 18 and other adjacent lands, and by permission of the city Happy constructed a six-inch underground tile drain from this pond across Sheridan street lying between the two blocks to a gulch in block 17 leading to the Spokane river. Some time after the construction of this drain, Happy conveyed block 17 to one Frost, Frost conveyed to one Schade, and Schade conveyed to the plaintiff, the B. Shade Brewing Company. Block 18, on the other hand, was conveyed by Happy, or through mesne conveyance from Happy, to the defendant Falls City Pickle Works. Soon after the plaintiff acquired title to block 17, it constructed a brewery near the outlet of this drain, and placed a manhole at the end of the drain as constructed by Happy, continuing the drain further down towards the river. From time to time this drain would clog up and the water from the drain undermined the brewery buildings, causing damage to the walls and floors. The present action was instituted against the Pickle Works and the city of Spokane, to restrain them from flowing the water from the pond on block 18 onto block 17, and to recover damages for past injuries. The plaintiff did not claim any liability on the part of the city, but alleged that the Pickle Works claimed that the drain was a public sewer of the city, and the city was made a party defendant to avoid a multiplicity of suits. At or about the time of the commencement of the action, the Pickle Works sold out to the Spokane & Inland Empire Railroad Company, and the railroad company was made a party defendant. At the close of the plaintiff's testimony the court granted a nonsuit, and from the judgment of nonsuit, the present appeal is prosecuted.

The appellant has discussed at considerable length the question of the implied grant and implied reservation of easements, and contends that upon the conveyance of block 17 by deed of general warranty with covenants against encumbrances, the right to flow water or maintain the drain from block 18 to block 17 ceased. The respondents, other than the city, on the other hand, declare that they have no concern

with this abstract question; that the drain was constructed by the common grantor of the two blocks; that if the appellant desires to close the drain it must do so at its own expense; that the respondents did not construct the drain and are under no obligation to abate or close it. This latter contention, in our opinion, must be sustained. If a property owner constructs a drain from one portion of his property to another for his own convenience, and later sells the dominant and servient estates to different parties, no obligation rests on the grantee of the dominant estate to undo what was done by his grantor. If the right to continue the drain does not survive after the conveyance, the burden rests upon the grantee of the servient estate to remove or close the drain, rather than upon the grantee of the dominant estate. *Stevens v. Stevens*, 11 Met. (Mass.) 251, 45 Am. Dec. 203; *Hodgkins v. Farrington*, 150 Mass. 19, 22 N. E. 73, 15 Am. St. 168, 5 L. R. A. 209; *Carter v. Page*, 26 N. C. 424.

There is nothing in the record tending to show that the drain was a public one, or that the city was in any manner liable for its construction or continuance. The judgment is therefore affirmed.

[No. 7852. Department One. October 6, 1909.]

E. TIMMERMAN *et al.*, *Appellants*, v. D. H. McCULLAGH *et al.*, *Respondents*.[1]

TAXATION — FORECLOSURE — SUMMONS — INCORRECT STATEMENT OF DATE. A county tax foreclosure of a general delinquency certificate is not void because the summons for publication incorrectly stated the date of the certificate; such requirement being descriptive only and to aid in identification, and is not essential to the jurisdiction of the court nor fatal to the proceedings, in the absence of a showing that the party was misled.

SAME — CERTIFICATE OF DELINQUENCY — TIME FOR ISSUANCE. Where a tax for 1895 became delinquent May 31, 1896, by the law then in

[1]Reported in 104 Pac. 212.

force, and a certificate of delinquency issued Aug. 1, 1901, for taxes for the year 1895, more than five years had elapsed, as required by the act of 1901.

SAME—SALE—VALIDITY—EXCESSIVE AMOUNT. A tax foreclosure judgment and sale is not void because of an overcharge of interest, since the owner has an opportunity to defend and is estopped to raise any but jurisdictional questions.

SAME — COLLATERAL ATTACK — PRESUMPTION. A tax foreclosure judgment and sale cannot be attacked collaterally because the officer making the sale did not have a certified copy of the order of sale, where the officer in his return recites that the order was "directed and delivered" to him; since all presumptions are in favor of the regularity of the proceedings.

Appeal from a judgment of the superior court for Franklin county, Zent, J., entered September 15, 1908, upon findings in favor of the defendants, after a hearing before the court upon an agreed statement of facts, in an action to quiet title. Reversed.

A. A. Hinman and *A. C. Routhe*, for appellants.

Horrigan, O'Brien & Coad, for respondents.

FULLERTON, J.—The appellants, who were plaintiffs below, brought this action to quiet title to certain real property situated in Franklin county. They claimed title to the land in dispute as purchasers at a sale under a tax foreclosure proceeding brought by Franklin county to foreclose its lien for delinquent taxes. The respondents were the owners of the property prior to the sale, and defended on the ground that their interests were not cut off by the foreclosure and sale, because of irregularities therein rendering the proceedings void. On the trial the court held the proceedings void, and that the title to the property was in the respondents, and rendered judgment accordingly. This appeal was taken therefrom.

The record does not disclose what particular fault rendered the proceedings void in the opinion of the trial judge, but counsel for the respondents assert that the proceedings are

void for a number of reasons, the first of which is that the summons is insufficient. The statutes relating to revenue and taxation provide that when the taxes have been delinquent for a period of five years and no certificate of delinquency has been issued for such delinquent taxes, the county treasurer shall issue a certificate of delinquency to the county in which the property is situated, and shall file such certificate with the clerk of the court, who shall, with the assistance of the treasurer and the prosecuting attorney, foreclose in the name of the county the tax lien embraced in such certificate. Notice of the foreclosure is required to be given in the form of a summons which shall contain the title of the court, a description of the property to be sold, with the name of the owner thereof if known, the name of the holder of the certificate, the date thereof, the amount for which the same was issued, the amount of all taxes paid for prior and subsequent years, and the rate of interest on said amount.

The summons in question here complied with the statute in all respects, except that it did not recite correctly the date of issuance of the certificate of delinquency; the correct date being August 1, 1901, whereas the summons gave the date as being January 31, 1898. It is this error that is thought to be fatal to the proceedings. But we cannot think the misstatement has that effect. The statute regulating the proceedings for the enforced collection of taxes is largely directory, and such proceedings are sufficient where they substantially comply with the statute. The requirement that the date of the certificate be given is for the purpose of description only, furnishing an additional aid by which it can be discovered and identified by the owner of the property in his search of the court proceedings. It is not essential to the jurisdiction of the court that the date be correctly given, and so long as the omission or misstatement does not mislead the owner, depriving him of some right which he otherwise would have, it is too much to say that it is fatal to the entire proceedings. In this case there is nothing tending to show that

the owners were misled in any manner by this misstatement in the notice. In fact there is no claim of this kind. Counsel argue that its omission is fatal because the statute gives it as one of the recitals the summons shall contain. But the statute itself makes it clear that no such fatality should follow its omission.

It is next contended that the certificate of delinquency itself is void because prematurely issued, but we think the contention is founded on a mistake of fact. The statute of 1901, in force when the certificate was issued, provided, it is true, that a certificate of delinquency could be issued to the county only after the expiration of five years from the date of delinquency. This certificate was issued on August 1, 1901, for taxes for the year 1895. Taxes for that year, by the statute then in force, became delinquent on May 31, 1896. More than five full years had elapsed between these dates.

There was an overcharge of interest making the total sum recited as due in the certificate of delinquency somewhat larger than it should have been. Judgment was entered for this larger sum, and the property sold to satisfy the judgment. It is contended that the sale is void because of this excessive charge. But this was not fatal. Overcharges by the taxing officers have usually been held fatal to a summary sale of property for taxes where the proceedings are *ex parte*. But the sale in this instance was not summary nor *ex parte*. In this state sales of property for taxes are made only after a foreclosure of the tax lien in a proceeding in which the owner is given notice and an opportunity to defend against overcharges or mistakes which increase the amount properly due. Being a party to the proceedings, he is estopped by the judgment to question collaterally matters which do not go to the jurisdiction of the court to render the judgment.

Lastly, it is contended that the officer making the sale did not have a certified copy of the order of sale, and consequently was without warrant or authority to sell the prop-

erty. The record as certified to this court does not show directly that a certified copy of the judgment and order of sale entered by the court was delivered to the treasurer, but that officer in his return of the sale recites that the order was "directed and delivered" to him. If the delivery of such an order be essential to a valid sale, we think this sufficient evidence of the fact that it was delivered. It must be remembered that the respondents are attacking the record collaterally. That in such an attack all presumptions are in favor of the regularity of the proceedings, and that want of jurisdiction must affirmatively appear before the proceedings will be declared void.

In our opinion the court erred in adjudging the foreclosure and sale void. The judgment is therefore reversed, and the cause remanded with instructions to enter a judgment for the appellants adjudging them to be the owners of the property in question and quieting their title thereto.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 7918. Department One. October 6, 1909.]

THE STATE OF WASHINGTON, *on the Relation of J. Clinton McFadden, Appellant*, v. E. SHORROCK *et al.*, *Respondents.*[1]

STATUTES — TITLE AND SUBJECTS — SCHOOL LAWS—VACCINATION. The provision in the school law for compulsory vaccination is within and germane to the title "An act to establish a general and uniform system of public schools," since the title need not be a complete index of the act, and may cover but one general subject, and the clause but defined the class of persons permitted to attend school and includes the means of effecting the object sought.

SCHOOLS AND SCHOOL DISTRICTS — CONDITIONS OF MEMBERSHIP—STATUTES—REPEALS—CONFLICT. The act, Laws 1907, p. 569, providing for compulsory attendance upon the public schools, does not conflict with or impliedly repeal the prior act, Laws 1905, p. 262, § 3,

[1]Reported in 104 Pac. 214.

subd. 9, providing that successful vaccination shall be required as a condition precedent to school membership; and the two acts together require compulsory vaccination.

SAME—COMPULSORY ATTENDANCE AND VACCINATION. The legislature has power to require all minors to attend the public schools and all pupils to be vaccinated.

SAME—STATUTES—EXCEPTIONS PRESUMED. In a law for the compulsory vaccination of all pupils attending the public schools, an exception will be presumed in favor of individuals whose health is such as to render the operation dangerous or injurious.

SAME—EXCEPTIONS—STATUTES—DEFINITENESS. A law requiring "successful vaccination" of school children is not too indefinite for enforcement because of its failure to define the terms used; and permitting attendance after the usual reaction, or after three operations without reaction, is not a violation of the statute, but a recognition of an intended exception.

Appeal from an order of the superior court for King county, Morris, J., entered December 4, 1908, upon overruling a demurrer to the answer, dismissing an application for a mandamus to compel a board of directors to permit a pupil to attend a public school. Affirmed.

Revelle, Revelle & Revelle, for appellant.

John W. Whitham, for respondents.

FULLERTON, J.—On October 30, 1908, the board of directors of Seattle School District No. 1, King county, state of Washington, at the suggestion of the commissioner of health of the city of Seattle, and the King County Medical Society, adopted a resolution requiring all pupils desirous of attending the public schools of the district to be successfully vaccinated as a condition precedent to their right so to do; further directing that the resolution be not enforced against any one whose condition of health was such as to render it unsafe for him to undergo vaccination. Under the provisions of this resolution, the appellant's minor son was excluded from one of the schools of the district, known as the University Heights school, solely because he refused to sub-

mit to vaccination. The appellant as relator thereupon applied to the superior court of King county for a writ of mandate against the board of directors to compel them to admit his son to the school. To his application the board of directors made a return, in which they gave as reasons for excluding the son the resolution above mentioned, together with the recommendations on which it was founded; the fact that smallpox then existed to a greater or less extent in the city of Seattle, and was epidemic in a mild form in many of the nearby cities; that the minor son of the appellant refused to be vaccinated, and the parents and guardian refused to cause or permit him to be vaccinated, and that to permit him to attend the school would be a menace to good health; and further that, by virtue of the laws of the state of Washington, the board of directors are clothed with power, and it is their duty, to require successful vaccination as a condition to school attendance, whenever in their judgment conditions demand the exercise of the power. To this return the appellant demurred on the grounds, first; that the act of the legislature on which the resolution of the board of directors was founded is unconstitutional; second, that it was repealed by a subsequent statute; and third, that it is too indefinite to be capable of enforcement. The superior court held the return to be sufficient, and overruled the demurrer. The appellant then elected to stand on his demurrer, whereupon the court entered a judgment dismissing the application.

The appellant urges in this court the objections to the return he insisted upon in the court below. He argues that the clause of the act of the legislature which the board of directors rely upon to sustain their action is unconstitutional, because it is not included in the title of the act of which it forms a part. In 1897, the legislature by a general act under the title "An act to establish a general uniform system of public schools in the state of Washington, and repealing," etc., provided a complete code for the government of the state educational institutions, and repealed by express

mention practically all of the prior acts relating thereto then upon the statute books. Laws 1897, p. 392; Laws 1905, p. 262. The act, among other things, provided for the organization of school districts in cities having a population of ten thousand or more, and the election of a board of directors to have charge and control of the schools and school property therein. Section 92 of the act reads as follows:

"Every board of directors shall have power, and it shall be their duty— . . .

"Ninth: To require successful vaccination as a condition of school membership and to provide free vaccination to all who are unable to pay for the same." Laws 1905, p. 263.

It is this clause that is thought not to be within the title of the act.

The section of the constitution providing that "No bill shall embrace more than one subject, and that shall be expressed in the title," has frequently been a subject for consideration by this court. In the early case of *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, we said that this word "subject" as used in the constitution could be interpreted in two ways; one to hold that the word is not capable of further reduction, and the other "to hold that it means a single subject in a more enlarged sense, in which may be included a large number of sub-subjects"; that to adopt the first would so tie the hands of the legislature as to make legislation extremely difficult if not impossible, while to adopt the second would substantially subserve the object which the framers of the constitution had in view, and at the same time leave the legislature free to legislate in a reasonable manner. The more liberal construction was thereupon adopted, and it has been the rule followed by the court since that time. Thus, in *Lancey v. King County*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817, it was held that an act of the legislature will not be declared void under this clause of the constitution except in cases where the violation is most clear; and that both public policy and legislative convenience require that this provision

should be liberally construed; that the purpose of the title is only to call attention to the subject-matter of the act, and that the act itself must be looked to for a full description of the powers conferred. In *State ex rel. American Sav. Union v. Whittlesey*, 17 Wash. 447, 50 Pac. 119, it was said that while the object of the constitutional provision is that neither the members of the legislature, nor the people, shall be misled by the title of a legislative act, it had never been held that the title should embody all the distinct provisions of the act in detail; that such a construction would be eminently unreasonable, for in such a case the body of the act would be nothing more than a repetition of the title. Again, in a number of cases it has been held that the title need not be an index to the body of the act, but is sufficient if it gives such notice of its subject as to reasonably lead to an inquiry into its body. See, *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Pac. 893; *McKnight v. McDonald*, 34 Wash. 98, 74 Pac. 1060; *Seattle & Lake Washington Waterway Co. v. Seattle Dock Co.*, 35 Wash. 503, 77 Pac. 845. In *State ex rel. Smith v. Board of Dental Examiners*, 31 Wash. 492, 72 Pac. 110, the court in passing on the question whether a penalty for practicing dentistry without a license could be enacted under a title reading "An act to regulate the practice of dentistry in the state of Washington, and declaring an emergency," used this language:

"It is true, the act shall contain but one subject, and that shall be expressed in its title. While the act shall contain but one subject, yet there are many phases of that subject that may properly be treated in the same act, just as a work upon the subject of damages may treat upon many phases of the general subject. It is impracticable to indicate in the title of either a book or a legislative act every phase of the general subject that may be treated. The subject of an act being to regulate the practice of a given profession, the legislature may include in the act the means related to the subject for effecting the object sought."

The clause in question, it will be noticed, does not empower the board of directors of the district to provide for compulsory vaccination. The appellant may or may not, as suits his desire, require his son to be vaccinated. The act does no more than provide that the board of directors may make vaccination a necessary condition precedent to attendance upon the public schools. It thus stands on the same plane as the provisions contained in the act for the exclusion of those afflicted with infectious or contagious diseases, or who reside in houses wherein such diseases are prevalent. In other words, it defines the class of persons who may be permitted to attend the schools created by the act. It seems to us, therefore, that when considered in the light of the rule announced by the cases cited, this clause is clearly within the title of the act. One would expect to find in an act establishing a general, uniform system of public schools, a provision defining the class of persons who may be permitted to attend on the schools thus created. It was therefore germane to the general subject, and this is sufficient to sustain its enactment under a title covering the general subject.

The second contention is that the act is repealed by the subsequent statute of March 16, 1907 (Laws 1907, p. 569), providing for the compulsory education of children. But this contention is likewise untenable. There is no express repeal of the one statute by the other, nor is there such a conflict between them as to work a repeal by implication. If the later statute required compulsory attendance on the public schools, the two statutes taken together might require compulsory vaccination, but even in that case there would be no repeal of the former by the latter; the legislature has power to require all minors to attend the public schools and to require them to be vaccinated before so attending. *Jacobson v. Massachusetts*, 197 U. S. 11, 11 Sup. Ct. 39, 49 L. Ed. 643. Nor is the statute void because it makes no allowance for those physically incapable of vaccination. But, as said by the su-

preme court of the United States, in *United States v. Kirby*, 7 Wall. 482, 19 L. Ed. 278:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

So here it is not presumed that the legislature intended to require, as a condition of its right to attend the public schools, the vaccination of a child whose condition of health is such that the operation would endanger its life or injuriously affect it mentally or physically. It is presumed that exceptions were intended in favor of such individuals, and if the officers having in charge the execution of the statute refused to recognize an exception in such a case, the courts can be appealed to to compel such recognition.

Finally, it is said that the statute is too indefinite to be capable of enforcement. This is founded on the fact that it requires "successful vaccination," and no definition of the term is furnished by the statutes. The board of directors, it appears, construed the statute to mean that a person was successfully vaccinated when the customary reaction was obtained by the operation, or when three operations had been performed without obtaining reaction. Here, again, we think the rule of common-sense construction can properly be invoked. Of course, if the customary reaction follows the operation, there is no question concerning the success of the operation. But if no reaction follows three several operations, it is evident that the individual cannot be vaccinated, and such individual can be held to be either successfully vaccinated, or as one not included within the general language used in the statute. To allow individuals to attend the schools, who from their condition of health or other causes cannot be successfully vaccinated, is not a violation of the statute as the appellant supposes. This is but a recognition

of an exception intended by the legislature, but which was not provided for because not foreseen.

We find no objection to the statute itself, nor to the manner in which it is being enforced. The order appealed from will therefore stand affirmed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

MORRIS, J., took no part.

[No. 7953. Department Two. October 8, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Mary O. Forney et al., Plaintiff*, v. THE SUPERIOR COURT FOR SPOKANE COUNTY *et al., Respondents.*[1]

APPEAL—REVIEW—PLEADINGS—HARMLESS ERROR. Error in overruling a demurrer to a petition in condemnation, because of failure to allege that all of the capital stock of the condemning railroad company had been subscribed, will be disregarded on appeal where the evidence showed that all its stock had been subscribed.

EMINENT DOMAIN—DEFENSES—ALIENAGE OF STOCKHOLDERS. The objection that the stock of a railroad company seeking to condemn property is held by aliens must be raised by plea in abatement or by proof offered in defense.

SAME—CONDITIONS PRECEDENT—CITY FRANCHISE. The obtaining of a city franchise to cross streets is not a prerequisite for the condemnation of a railroad right of way.

SAME—PROCEEDINGS—REVIEW—SCOPE. On certiorari to review an adjudication of public use and necessity, objection cannot be made to the setting of the case for trial on the subject of damages.

Certiorari to review a judgment of the superior court for Spokane county, Huneke, J., entered February 18, 1909, adjudging a public use and necessity, in condemnation proceedings to acquire property for railroad purposes, after a trial before the court and a jury. Affirmed.

[1]Reported in 104 Pac. 200.

John M. Bunn and *P. W. Kimball*, for relators.

Danson & Williams and *Hamblen & Gilbert*, for respondents.

PER CURIAM.—This is a proceeding to review an order or adjudication of public use and public necessity, entered in a condemnation proceeding instituted by the North Coast Railway Company to acquire certain property in the city of Spokane for railroad purposes.

The first error assigned is the overruling of a demurrer to the petition for condemnation. The particular ground of objection to the petition is that it does not allege that the whole amount of the capital stock of the petitioning corporation has been subscribed. The only allegation in the petition bearing upon that question is "that your petitioner is duly authorized to appropriate lands, real estate or premises within the state of Washington for a right of way and for necessary side tracks, depots, water stations, and other corporate purposes." This allegation is in the nature of a conclusion of law and is perhaps insufficient as against a demurrer, but the proof shows that all the corporate stock was in fact subscribed, and the error, if any, is a technical one which we are required to disregard on appeal. *State ex rel. Merriam v. Superior Court*, *ante* p. 64, 104 Pac. 148.

It is next contended that the proof fails to show that a majority of the capital stock of the petitioning corporation is not held by aliens. The defense of alienage, or that a majority of the capital stock of the corporation is held by aliens, should be raised by plea in abatement, or at least by proof offered by the defense. This was the practice followed in the case of *State ex rel. Morrell v. Superior Court*, 38 Wash. 542, 74 Pac. 686, cited by the relator, and such is the general rule in kindred cases. *Shivers v. Wilson*, 5 Harr & J. (Md.) 130, 9 Am. Dec. 497; *Martin v. Woods*, 9 Mass. 377; *Burnside v. Matthews*, 54 N. Y. 78; *Lee v. Salinas*, 15 Tex. 495; 2 Cyc. 110; 1 Ency. Plead. & Prac., p. 10.

The objection that the proof fails to show that the petitioner has obtained a franchise from the city of Spokane, or that there is a necessity for the taking, is disposed of by the opinion in *State ex rel. Merriam v. Superior Court, supra.* The objection to setting the cause for trial before a jury on the question of damages is not before us on an application of this kind, but in any event the objection seems to be without substantial merit.

Finding no error in the record the judgment is affirmed.

[No. 8013. Department Two. October 8, 1909.]

CHRISTIAN O. ROOD, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries for $3,708, reduced by the trial court to $3,008, is not excessive, where it appears that the plaintiff, a carpenter and joiner, twenty-eight years old, earning $3.50 a day, lost the entire little finger of his left hand, the middle finger above the knuckle joint, and the end of the index finger, leaving them very sensitive to the touch and cold and incapable of picking up material or tools.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 12, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an operator of a planing machine. Affirmed.

James B. Howe and *Hugh A. Tait*, for appellant.

Henry Gulliksen and *Vince H. Faben*, for respondent.

PER CURIAM.—This action was instituted to recover damages for personal injuries sustained by the plaintiff while operating a planing machine or joiner in the defendant's shops at Georgetown, in this state. The jury returned a

[1]Reported in 104 Pac. 249.

verdict in favor of the plaintiff in the sum of $3,708, but on motion for a new trial, the court required the plaintiff to remit the sum of $700 from the verdict or submit to a retrial. The remission was made, and from a judgment on the verdict for the residue, this appeal is prosecuted.

The sole error assigned in support of the appeal is that the verdict is still excessive. The testimony shows that the respondent is twenty-seven or twenty-eight years of age, a carpenter and joiner by trade, with an earning capacity of $3.50 per day. Through the accident he lost the entire little finger of his left hand, the middle finger was amputated about the knuckle joint, the end of the index finger was cut off diagonally, but the bone was not injured, while the ring finger was cut off in childhood.

The testimony shows that the injured fingers are very sensitive to the touch and to the cold, and this is so far a matter of common knowledge that the court may take judicial notice of it. The respondent cannot pick up material, nails or tools with the injured hand, and is greatly hampered in climbing ladders, etc. Under all the circumstances, we are unable to say that a verdict of $3,008 is excessive, especially in view of the fact that the trial court has already exercised its discretion and reduced the amount of the recovery to such sum as it deemed just and compensatory.

The judgment is therefore affirmed.

[No. 7897. Department Two. October 8, 1909.]

EDD D. SMITH, *Appellant*, v. THE CITY OF SPOKANE, *Respondent*.[1]

CONSTITUTIONAL LAW—RIGHT TO ENGAGE IN OCCUPATIONS—HEALTH REGULATIONS—MUNICIPAL CORPORATIONS. Ordinances of a city of the first class creating a crematory department for the collection and disposition of refuse and garbage, and making it unlawful for any person other than authorized employees of the department to engage in hauling in the city any such refuse, except manure, are not unconstitutional as preventing one formerly in that business from engaging in a lawful occupation.

MUNICIPAL CORPORATIONS — HEALTH REGULATIONS — ORDINANCES. An ordinance making it unlawful for any one outside the crematory department to haul refuse through the streets is not restricted by Bal. Code, § 3000, requiring owners of private property to remove the source of filth upon twenty-four hours' notice, the latter affording merely a cumulative remedy.

CONSTITUTIONAL LAW—POLICE POWER—HEALTH REGULATIONS—MUNICIPAL CORPORATIONS. Ordinances conferring the exclusive right to collect garbage and refuse upon a city department are within the police power in that they tend directly to promote the public health.

MUNICIPAL CORPORATIONS — HEALTH REGULATIONS — OBJECTIONS—PERSONS ENTITLED. An ordinance creating a crematory department for the collection of garbage cannot be objected to by a stranger as delegating to a board the power to fix a schedule of prices, when the prices fixed were satisfactory to the parties concerned.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered January 19, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to restrain the enforcement of a city ordinance. Affirmed.

Swanson & Ripley, for appellant.

L. R. Hamblen, *F. D. Allen*, and *Harry A. Rhodes*, for respondent.

RUDKIN, C. J.—Ordinance No. A3,033 of the city of Spokane, approved October 11, 1907, created a crematory de-

[1]Reported in 104 Pac. 249.

partment in the city government and provided that such department should collect and dispose of all manure, garbage, offal, refuse, rubbish, dead animals, or any vegetable or animal matter detrimental to health, under the sanitary ordinances of the city. Ordinance No. A3,791, approved September 24, 1908, declared that it should be unlawful for any person, firm or corporation, or any agent or employee thereof, other than the authorized officers, agents, and employees of the crematory department, to haul, carry or convey, through, along, or upon any public street, alley or sidewalk within the city, any garbage, night soil, ashes, or any waste or refuse substances, except manure, and provided a penalty for the violation thereof.

For about ten years last past the plaintiff has been engaged in hauling swill, offal, manure, garbage, night soil, and other refuse substances in the city of Spokane, and such employment has been rendered unlawful by the provisions of the last-mentioned ordinance. This action was instituted for the purpose of restraining the city and its officers from enforcing the provisions of this ordinance as against the plaintiff and those similarly situated, and from a judgment dismissing the action, the present appeal is prosecuted.

The principal contention of the appellant is that the ordinances complained of deny to him the right to engage in a lawful occupation to earn a livelihood for himself and family, and are therefore obnoxious to the constitution of this state and the constitution of the United States. This contention cannot be sustained. In all matters pertaining to the public health, nearly if not the entire police power of the state is vested in municipal corporations of the first class. Under its charter and the general laws of the state, the city of Spokane may define and abate nuisances, regulate and prohibit the carrying on of occupations which are of such a nature as to affect the public health, and make all needful rules and regulations for the health, comfort, safety, and well-being of the city and its inhabitants. See, Bal. Code, § 739, subds. 22, 30,

34, 36 (P. C. § 3732), and like provisions contained in the city charter. Nor are these powers limited or restricted by Bal. Code, § 3000 (P. C. § 7600), which provides that the owner or occupant of private property must remove any source of filth or sickness upon twenty-four hours' notice from certain officers. The latter section was enacted in territorial days, and if in force at all, affords a cumulative remedy only.

We think the subject-matter of these ordinances are clearly within the police power of the state. The limits of that power are not easily defined, for, as said by Shaw, C. J., in *Commonwealth v. Alger*, 7 Cush. 53, 85, "It is much easier to perceive and realize the existence and sources of this power, than to mark its boundaries, or prescribe limits to its exercise." But that the removal and destruction of the noxious, unwholesome substances mentioned in these ordinances tends directly to promote the public health, comfort, and welfare would seem to be beyond question. If so, an ordinance which tends to accomplish these results is a proper exercise of the police power; and from this power is necessarily implied the duty to determine the means and agencies best adapted to the end in view. That that object can best be attained by entrusting the work in hand to some responsible agency under the control of the city, possessing the facilities for carrying it on with dispatch, and with the least possible inconvenience, must be apparent to all. Ordinances conferring the exclusive right to collect garbage and refuse substances upon some department of the city government, or upon a contractor with the city, have almost universally been sustained. *Smiley v. MacDonald*, 42 Neb. 5, 60 N. W. 355, 47 Am. St. 684, 27 L. R. A. 540; *Walker v. Jameson*, 140 Ind. 591, 37 N. E. 402, 39 N. E. 869, 49 Am. St. 222, 28 L. R. A. 679; *In re Vandine*, 6 Pick. 187, 17 Am. Dec. 351; *State v. Fisher*, 52 Mo. 174; *River Rendering Co. v. Behr*, 7 Mo. App. 345; *Alpers v. San Francisco*, 32 Fed. 508; *National Fertilizer Co. v. Lambert*, 48 Fed. 458; *In re Zhizhuzza*, 147 Cal. 328, 81 Pac. 955.

We are therefore of opinion that the ordinances in question fall within the police power of the state, and deny to the appellant no right or privilege guaranteed to him by either the constitution of this state or of the United States. The appellant attacks the first mentioned ordinance on the further ground that it delegates to the board of public works the power to fix a schedule of prices for the removal of garbage, but he is in no position to raise that question. If the prices fixed are satisfactory to the parties immediately concerned, a stranger will not be heard to complain.

In view of the conclusion we have reached on the merits of the case, we deem it unnecessary to discuss or consider the question whether injunction is the proper remedy. There is no error in the record and the judgment is affirmed.

CROW, PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8078. Department Two. October 9, 1909.]

JOHN T. AMES, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—ASSESSMENTS—SPECIAL FUNDS—WRONGFUL DIVERSION—PREJUDICE. A wrongful diversion of a special street fund, to the prejudice of the plaintiff, is not shown where it appears that, if none of the wrongful acts complained of had been committed by the city authorities, the special fund would have been exhausted by the payment of warrants in their order prior to the warrant held by the plaintiff.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 11, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to recover on a city warrant. Reversed.

Scott Calhoun and *H. D. Hughes*, for appellant.

Frank A. Steele and *Walter B. Beals*, for respondent.

[1]Reported in 104 Pac. 199.

Crow, J.—Action by John T. Ames against the city of Seattle, to recover the principal and interest remaining due on a local street improvement fund warrant. From a judgment in favor of the plaintiff, defendant has appealed.

There is but little controversy relative to the facts of the case. The evidence shows that, in 1888, the city of Seattle improved Depot street, and levied a special assessment upon benefited property to pay the expense thereof; that warrants were issued to the contractors against the special fund thereby created; that respondent purchased, and now owns, warrant No. 326, for $500, dated May 30, 1889, bearing interest at the rate of ten per cent; that his warrant was presented for payment on May 31, 1889, and indorsed "Not paid for want of funds;" that all other warrants against the special fund, including those subsequent to respondent's, have been paid, and that no payments have been made on his warrant save $125 interest to November 30, 1891, and the further sum of $146.89 paid November 19, 1907, which exhausted the special fund. Respondent therefore contends that the city is liable for the payment of his warrant by reason of its wrongful and negligent acts, in applying the special fund to the payment of subsequent warrants out of their order, to his damage.

The appellant contends, that warrants which matured and were payable prior to No. 326, held by respondent, were paid by the city out of its general fund, in satisfaction of judgments obtained thereon by reason of the city's negligent acts; that only $2,500 of the special street fund was applied to the payment of warrants subsequent to No. 326; that the city compromised special assessments, with property owners in the district, and as the result of such compromises lost $750 from the special fund; that its total acts of negligence did not cause a depletion of the special fund in excess of $3,250; that respondent's warrant 326 was in no way prejudiced by the city's negligent acts, as the sum of $3,250 above mentioned,

if collected and properly applied, would not have enabled the special fund to reach and satisfy the warrant in its order of payment; that respondent has not been prejudiced, and that he is not entitled to recover.

The record does show that several warrants prior to respondent's were paid by appellant out of its general fund in satisfaction of judgments rendered against it in actions arising out of its negligence; that had the entire proceeds of the collections in the special fund been applied to the payment of such prior warrants in the order of their maturity, and had the sum of $3,250, lost or diverted by appellant's negligence, been also properly applied to their payment, there would never have been sufficient money in the special fund to pay the warrant No. 326, now held by respondent. These facts being established by the evidence, respondent has not shown any cause of action arising in tort, although this is an action in tort. This action is not prosecuted to enforce a payment of respondent's warrant from the special fund on which it was drawn. That fund has been exhausted, and was not sufficient, if properly applied, to reach and pay his warrant in its regular order of maturity. Respondent now seeks to hold the city and its general fund liable for its wrongful acts, which he says prevented the payment of his warrant from the special fund. The only theory upon which he can recover is that the wrongful acts of the city were prejudicial to him. But it is apparent from the record that if the city had committed none of the wrongful acts of which he complains, but had properly handled the entire special fund, there would not have been sufficient money in such special fund to pay him.

The city in its brief concedes that those prior warrant holders who, in the order of right of payment, could have been paid out of the $3,250 if the same had not been lost or misapplied by its negligent acts, were entitled to recover in actions for damages. A number of prior warrant holders did recover judgments which were paid and satisfied from the

general fund. It is a conceded fact that such prior warrants were not paid from the special fund on which they and respondent's warrants were drawn. The vital question presented is whether the diversion of the special fund to the payment of subsequent warrants was prejudicial to respondent. If it was, he has an action for damages. Otherwise, he cannot recover. In *Northwestern Lumber Co. v. Aberdeen*, 35 Wash. 636, 639, 77 Pac. 1063, this court said:

"The complaint alleges a wrongful diversion of the special street improvement funds of respondent, and the payment, without authority, of moneys belonging to said funds, on warrants which were issued against the same and subsequently numbered. But it fails to allege that there was sufficient money, belonging to any of these special funds, diverted therefrom, to have paid and satisfied the other warrants against the same funds, issued in their regular order and prior in dates and numbers to these warrants held by appellant; or that appellant, at the times of the alleged diversion of such funds, was rightfully entitled to have such money, or any part thereof, applied towards the payment and liquidation of its warrants described in the complaint. In other words, the appellant was required to allege sufficient facts to show that it was prejudiced by the payment of those subsequent warrants out of their regular order, and that it had the lawful right to insist that this money, or some portion thereof, should have been applied towards the payment of the warrants in question. For aught that appears from the complaint, this money was insufficient in amount to have paid such prior outstanding paper, and the accrued interest thereon. If such were the case, appellant has no just or legal cause of complaint in the present controversy."

The undisputed evidence shows that the special fund unaided, if not improperly diverted, would not have satisfied respondent's warrant in its regular order of payment. He can claim no benefit by reason of the payment of prior warrants out of the general fund in satisfaction of judgments, and if he be awarded damages in this action, he is placed in a better position by reason of the city's wrongful acts than

he would have been in had no such acts been committed. He cannot recover on any such theory.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8101. Department Two. October 9, 1909.]

JOHN T. WHEATMAN, *Appellant*, v. GEORGE T. KANE, *Respondent*.[1]

PLEADINGS—DEMURRER—DEFECTS CURED BY EVIDENCE. The objection that a petition does not state sufficient facts to support the findings, cannot be urged where no demurrer was interposed to the petition or objection made prior to the trial, and the evidence admitted cured any defect in the pleading.

FRAUDULENT CONVEYANCES—GOOD FAITH—EVIDENCE. The evidence is sufficient to support findings of the good faith of an assignment of proceeds of insurance policies to a debtor's brother, where it appears that he held a *bona fide* second mortgage upon the property destroyed by fire, of which the agent was informed when the policies were written, that his claim was recognized by the first mortgagee to whom the policies were payable as his interest might appear, and by the insurance companies before garnishment, and that the assignment and proofs of loss recognizing the same were made before the issuance of the writs of garnishment.

Appeal from a judgment of the superior court for Whatcom county, Neterer, J., entered November 25, 1908, upon findings in favor of the defendant, after a trial on the merits before the court in garnishment proceedings. Affirmed.

H. E. Foster, for appellant.

Pemberton & Sather, for respondent.

CROW, J.—In September, 1908, the plaintiff, John T. Wheatman, obtained a judgment for $425.26 against the de-

[1]Reported in 104 Pac. 258.

fendant D. D. Kane. Afterwards he prosecuted garnishment proceedings against two fire insurance companies, claiming they were indebted to D. D. Kane. The garnishee defendants answered, and paid into court the sums which they admitted to be due from them to D. D. Kane on two policies of insurance for losses by fire. In their answer they alleged that George T. Kane claimed the money. George T. Kane, who is a brother of D. D. Kane, filed a petition in which he alleged that he held the note of D. D. Kane, secured by a second chattel mortgage on property destroyed by the fire, the first mortgage being held by the Skagit State Bank; that the proceeds of the policies had been assigned to him by D. D. Kane, in satisfaction of his claim, and demanded that the same be paid to him after first satisfying the prior claim of the bank. The plaintiff denied the allegations of this petition, and insisted that George T. Kane held no valid claim against D. D. Kane, but that the pretended assignment, if it ever was made, was fraudulent and void. The trial court held the claim of George T. Kane to be valid, and ordered its payment. The plaintiff has appealed.

After pleading his note and mortgage, the respondent in his petition alleged:

"That after said property was destroyed by fire and after the adjustment of the loss by said insurance companies, the policies of the insurance companies and the proof of loss and the amount due said D. D. Kane over and above the amount due and payable to the Skagit State Bank were assigned to George T. Kane to satisfy the amount remaining due on the note and mortgage hereinbefore described."

Appellant, by his first assignment of error, contends that the trial court erred in admitting evidence tending to support the allegations of this petition, for the reason that it does not state facts sufficient to support findings in favor of the respondent George T. Kane. In support of this assignment, he contends that the petition is defective for the reason that it fails to allege that the assignment of the claims upon the policies, to George T. Kane, were filed with the garnishee in-

surance companies, or that they were made prior to the issuance and service of appellant's writ of garnishment. No demurrer appears to have been interposed by the appellant, nor did he otherwise plead to the petition at any time prior to the trial. The evidence introduced was amply sufficient to cure any defect now suggested by appellant, and the only question we can consider is whether the petition, aided by the evidence, is sufficient to support the final judgment. We find that it is sufficient, and the appellant's contention cannot be sustained.

The controlling issues in this case are issues of fact only. We do not deem it necessary to enter upon a detailed statement of the evidence, our conclusion being that by its clear preponderance it warrants the findings made, which in turn support the final judgment. It was made to appear that George T. Kane held a valid *bona fide* note against D. D. Kane secured by a second chattel mortgage on the property, which being insured was destroyed by fire; that the insurance policies were made payable to the Skagit State Bank as its interest might appear; that although they were not made payable to George T. Kane, second mortgagee, the agent of the insurance companies was informed, at the time the policies were written, that George T. Kane claimed an interest as mortgagee; that proofs of loss were made in which it was stated that the Skagit State Bank held a first mortgage lien and that the respondent George T. Kane held a second mortgage lien; that the proofs thus made were received and approved by the insurance companies; that immediately after the fire the respondent George T. Kane authorized an attorney in Bellingham to represent him and protect his interests arising out of his note and mortgage, and that D. D. Kane delivered the policies to the attorney as respondent's agent, with instructions to receive the amount due thereon and apply it to the satisfaction of the lien of George T. Kane, after the prior lien of the bank had been first paid. All of this was done, and the proofs of loss stating respondent's claim were made, prior to the issuance or service of appellant's writ of

garnishment. The insurance companies seem to have recognized the validity of respondent's claim, and in their answers called attention to the same, when they paid into court the losses due upon the policies. The evidence convinces us that the respondent was entitled to the proceeds of the policies, after payment of the prior claim of the bank.

The judgment is affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and MOUNT, JJ., concur.

[No. 8014. Department Two. October 9, 1909.]

EDWIN C. EWING, *Respondent*, v. THE CITY OF SEATTLE *et al.*, *Appellants*.[1]

STREET RAILROADS—FRANCHISES—RESTRICTIONS—MUNICIPAL CORPORATIONS—CHARTERS—STATUTES. Charters adopted by cities of the first class are subject to and controlled by general laws; and Laws 1907, p. 192, authorizing cities to grant franchises to street railroads and to prescribe the terms and conditions thereof, supersedes the city charter of Seattle, art. 4, § 23, requiring such franchises to be sold at public auction to the highest bidder.

MUNICIPAL CORPORATIONS—FRANCHISES—LEGISLATIVE AUTHORITY—CONTROL BY COURTS. The power conferred upon the legislative authority of municipal corporations to grant franchises for the use of the streets is purely legislative and cannot be controlled by the courts.

STATUTES—SUBJECTS AND TITLES. An act entitled an act "relating to electric railways . . . and the use of streets and roads thereby" is sufficiently comprehensive to embrace provisions relating to the granting of franchises therefor by the legislative authority of cities.

Appeal from an order of the superior court for King county, Morris, J., entered February 10, 1909, granting a temporary injunction, after a hearing before the court upon the pleadings and affidavits. Reversed.

[1]Reported in 104 Pac. 259.

Scott Calhoun, James E. Bradford, James B. Howe, and *R. G. Sharpe,* for appellants, contended, *inter alia,* that the granting of the franchise was vested in the mayor and city council and involves legislative action only. McQuillan, Municipal Ordinances, § 569; Nellis, Street Surface Railroads, § 4; 27 Am. & Eng. Ency. Law (2d ed.), 14-15; *Benton v. Seattle Elec. Co.,* 50 Wash. 156, 96 Pac. 1033; *Tenny v. Seattle Elec. Co.,* 48 Wash. 150, 92 Pac. 895; *Schwede v. Hemrich Bros. Brewing Co.,* 29 Wash. 21, 69 Pac. 362; *New Orleans Waterworks Co. v. New Orleans,* 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *State ex rel. Kansas City v. East Fifth St. R. Co.,* 140 Mo. 539, 41 S. W. 955, 62 Am. St. 742, 38 L. R. A. 218; *Conery v. New Orleans Water Works Co.,* 41 La. Ann. 910, 7 South. 8; *Kadderly v. Portland,* 44 Ore. 118, 74 Pac. 710, 75 Pac. 222; *Wright v. Nagle,* 101 U. S. 791, 25 L. Ed. 921; *Des Moines Gas Co. v. Des Moines,* 44 Iowa 505, 24 Am. Rep. 756; *Hayes v. Michigan Cent. R. Co.,* 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Alpers v. San Francisco,* 32 Fed. 503; *Kittinger v. Buffalo Traction Co.,* 160 N. Y. 377, 54 N. E. 1081; *State ex rel. Rose v. Superior Court,* 105 Wis. 651, 81 N. W. 1046, 48 L. R. A. 819; *Albright v. Fisher,* 164 Mo. 56, 64 S. W. 106; *West Seattle v. West Seattle Land & Imp. Co.,* 38 Wash. 359, 80 Pac. 549; *Rapp v. Stratton,* 41 Wash. 263, 83 Pac. 182. The provision authorizing the council to reject "any and all bids" vests a discretion which is not reviewable by the courts. 1 Abbott, Municipal Corporations, 602; *Times Pub. Co. v. Everett,* 9 Wash. 518, 37 Pac. 695, 43 Am. St. 865; *Kelly v. Chicago,* 62 Ill. 279; *Commonwealth v. Mitchell,* 82 Pa. St. 343; *Findley v. Pittsburgh,* 82 Pa. St. 351; *Douglass v. Commonwealth,* 108 Pa. St. 559; *Trowbridge v. Hudson,* 24 Ohio Cir. Ct. 76; *Anderson v. Public Schools,* 122 Mo. 61, 27 S. W. 610, 26 L. R. A. 707; *Brown v. City of Houston* (Tex. Civ. App.), 48 S. W. 760; *State ex rel. Irondale Chert Paving & Imp. Co. v. New Orleans,* 48 La. Ann. 643, 19 South. 690; *Gunning*

Gravel & Paving Co. v. New Orleans, 45 La. Ann. 911, 13 South. 182; *Girvin v. Simon*, 116 Cal. 604, 48 Pac. 720; *Ryan v. Mayor of Paterson*, 66 N. J. L. 533, 49 Atl. 587; *Trapp v. Newport*, 25 Ky. Law 224, 74 S. W. 1109; *Peckham v. Watsonville*, 138 Cal. 242, 71 Pac. 169; *Colorado Pav. Co. v. Murphy*, 78 Fed. 28, 49 U. S. App. 17, 37 L. R. A. 630. An unsuccessful bidder has not sufficient interest to maintain the suit. 2 Beach, Modern Law Contracts, p. 2266, § 1761; High, Extraordinary Remedies, § 92; *Colorado Pav. Co. v. Murphy, supra; State ex rel. Phelan v. Board of Education*, 24 Wis. 683; *Commonwealth v. Mitchell, Kelly v. Chicago, Times Pub. Co. v. Everett*, and *Douglass v. Commonwealth, supra; State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *Madison v. Harbor Board*, 76 Md. 395, 25 Atl. 337.

Higgins, Hall & Halverstadt and *Edwin C. Ewing*, for respondent, contended, among other things, that the act of deciding between the bidders is not a legislative, but a judicial or ministerial act. Cooley, Constitutional Limitations, page 108; *Central Pac. R. Co. v. Gallatin*, 99 U. S. 718, 762, 25 L. Ed. 496, 516; *West Jersey Traction Co. v. Board of Public Works of Camden*, 56 N. J. L. 431, 29 Atl. 163; *City of Evansville v. State ex rel. Blend*, 118 Ind. 426, 21 N. E. 267, 4 L. R. A. 93; *Smith v. Strother*, 68 Cal. 194, 8 Pac. 852; *Wulzen v. Board of Supervisors of San Francisco*, 101 Cal. 15, 35 Pac. 353, 40 Am. St. 17; *State v. Johnson*, 61 Kan. 803, 60 Pac. 1068, 49 L. R. A. 662; *Tanner v. Nelson*, 25 Utah 226, 70 Pac. 984; *Knorr v. Miller*, 11 Ohio Dec. 165. And the courts will grant an injunction if the council acts corruptly, arbitrarily, or not in good faith. 1 Abbott, Municipal Corporations, 602; Beach, Public Corporations, § 698; *Gunning Gravel & Paving Co. v. New Orleans*, 45 La. Ann. 911, 13 South. 182; *Mueller v. Eau Claire County*, 108 Wis. 304, 84 N. W. 430; *McGovern v. Board of Public Works*, 57 N. J. L. 580, 31 Atl. 613;

Wilson v. Inhabitants of Trenton (N. J. L.), 38 Atl. 635; *Van Rensselaer v. Shafer*, 121 N. Y. 712, 25 N. E. 4; *Faist v. Mayor etc. of Hoboken*, 72 N. J. L. 361, 60 Atl. 720; *Berry v. Tacoma*, 12 Wash. 3, 40 Pac. 414; *Times Printing Co. v. Seattle*, 25 Wash. 149, 64 Pac. 940; *Puget Sound Publishing Co. v. Times Printing Co.*, 33 Wash. 551, 74 Pac. 802. The plaintiff had sufficient interest as a taxpayer to maintain the suit. *Berry v. Tacoma, Times Printing Co. v. Seattle*, and *Puget Sound Publishing Co. v. Times Printing Co., supra.*

PARKER, J.—This is an appeal from an order granting a temporary injunction restraining the defendants from proceeding farther in their action towards granting to the intervener a franchise to construct and operate a street railway upon certain streets of the city of Seattle.

The power to grant such franchise by the legislative branch of the city government is found in the Laws of 1903, p. 364, as amended by the Laws of 1907, p. 192; and so far as applicable to this controversy, is as follows:

"The legislative authority of the city or town having control of any public street or road, or where such street or road is not within the limits of any incorporated city or town, then the board of county commissioners wherein such road or street is situated, may grant authority for the construction, maintenance and operation of electric railroads or railways, motor railroads or railways and railroads and railways of which the motive power is any power other than steam, together with such poles, wires and other appurtenances upon, over, along and across any such public street or road and in granting such authority the legislative authority of such city or town or the board of county commissioners, as the case may be, may prescribe the terms and conditions on which such railroads or railways and their appurtenances shall be constructed, maintained and operated upon, over, along and across such road or street, and the grade or elevation at which the same shall be maintained and operated."

Section 23, art. 4, of the Freehold Charter of the city of Seattle, contains provisions which it is claimed by plaintiff limit and control the exercise of this power, as follows:

"Sec. 23. The city council shall not grant authority to construct a street railway or lay down railroad tracks upon or over any of the streets of said city, except in the manner and on the terms following, that is to say: Upon the application being made to the city council for authority to construct and operate a street railway along and upon any of said streets, the city council shall, by resolution, determine whether such franchise, or any part thereof, shall be granted, and after such determination, shall cause notice of such application and resolution to be published for ten days in the city official newspaper, at the expense of the applicant, and shall in such notice specify the route over and along which it proposes to grant such franchise, and shall offer to grant the same to the person, company or corporation who will pay for the franchise the highest percentage annually of gross receipts, but not less than two per cent per annum. Bidding for such franchise must be in accordance with the provisions of this charter in relation to bids made to the board of public works, so far as such provisions may be applicable, and the city council may reject any and all bids, and may refuse to grant a franchise for any part of the route for which the application was made. Each bid must be accompanied by a certified cheque, payable to the order of the city comptroller, for the sum of one thousand dollars, and the amount of the cheque shall be forfeited and paid to the city in case the successful bidder shall fail to accept the franchise, and upon acceptance the sum so paid shall be credited to the grantee on account of percentages. The same method of procedure shall obtain in the case of the extension of such franchise or any existing franchises."

With these statute and charter provisions before us, we will notice the undisputed facts as they appear by the pleadings and affidavits before the court upon the hearing of the application for the temporary injunction. Since our view of the case would be unaffected by the disputed facts, we need not notice them.

On November 9, 1908, the intervener made application to

the city of Seattle for a franchise to construct and operate a street railway upon certain streets of the city, and thereupon there was introduced in the city council an ordinance for the granting of such franchise, wherein was fully prescribed the terms and conditions thereof, among other things, providing:

"The grantee, its successors or assigns, shall pay annually to the City of Seattle ..... per cent per annum of the gross receipts derived from the operation of said railway, from and after the date of the acceptance of this franchise until its expiration, and in addition thereto shall pay annually to the city of Seattle, from and after the first day of January, A. D. 19...., and until the expiration of said franchise, an additional percentage of ..... per cent, of the gross receipts derived from the operation of said railway from and after said first day of January, A. D. 19....."

On December 7, 1908, the city council passed a resolution by which it determined to grant such franchise, and thereupon caused notice of the application, resolution and proposed ordinance granting the franchise to be published, inviting bids, as provided by the charter provisions above quoted. On January 4, 1909, in pursuance of the notice, bids were received by the council, when the intervener bid and offered to pay for the franchise two per cent per annum of the gross receipts derived from the operation of the railway under the franchise until its expiration, and one per cent per annum additional after January 1, 1920, until its expiration; and the plaintiff bid and offered to pay for the franchise ten per cent per annum of the gross receipts derived from the operation of the railway under the franchise until its expiration, and fifteen per cent per annum additional after January 1, 1920, until its expiration. No other bids were received. Certified checks accompanied the bids as provided by the charter.

On January 18, 1909, after considering the bids, the council accepted the bid of the intervener, and formally passed the ordinance granting the franchise to it. On January 19,

1909, the ordinance was by the clerk presented to Honorable John F. Miller, mayor, for his approval. On the same day the superior court issued a temporary restraining order, at the instance of plaintiff, against the defendants, restraining the mayor from signing the ordinance or taking any action thereon other than to veto it, restraining the clerk from publishing it, and restraining the council from passing it over the mayor's veto, until the further order of the court, and directing the defendants to show cause on January 29, 1909, why a temporary injunction should not issue enjoining them from doing any of said acts, until the final hearing of the cause. On January 29, 1909, the cause came on for hearing upon the order to show cause, and the matter being heard upon the pleadings and affidavits read in behalf of the respective parties, the court granted a temporary injunction, restraining the defendants until final hearing of the cause, substantially as in the temporary restraining order. From this action of the court, the defendants and intervener have appealed.

The grounds upon which the plaintiff sought to have the defendants enjoined are, in substance, that the council did capriciously, arbitrarily, without right or power so to do, in violation of his rights in the premises, and contrary to the provisions of the charter above quoted, determine that the bid of the intervener be accepted and that the bid of the plaintiff be rejected; and did capriciously, arbitrarily, without right or power so to do, in violation of his rights in the premises, and contrary to the provisions of the charter, attempt to grant said franchise to the intervener, by the passing of said ordinance. Several affidavits in behalf of the respective parties were read upon the hearing, both in support of and against this contention. It may be conceded, for the sake of argument, that the showing made in behalf of the plaintiff was such as to warrant the learned trial court in granting the temporary injunction, provided the action of the legislative branch of the city government in the premises

was of that nature which is subject to control by the courts.

The principal contention of counsel for the defendants and intervener is that the granting of the franchise is a legislative act, and therefore an act which the lower court had no power to restrain. Answering this contention, counsel for plaintiff contend that the process of granting the franchise under the charter provisions is divided into two parts; first, the legislative process of determining whether or not a franchise shall be granted, and of determining its terms and conditions; and second, the ministerial or at most judicial process of determining the highest bid and naming the grantee. It is plain, indeed it seems to be conceded, that in so far as their acts are purely legislative, the courts have no lawful power to interfere with or restrain the mayor or council, and that the grant of the franchise would be wholly legislative but for the charter provisions above quoted relating to the offering of the franchise to the highest bidder. In the case of *Tenny v. Seattle Electric Co.*, 48 Wash. 150, 92 Pac. 895, this court, following the general rule, said,

"The passage of an ordinance by a city council granting a franchise to a public service corporation involves legislative action only . . . Such legislative action cannot be reviewed by a writ of certiorari."

In the case of *New Orleans Waterworks Co. v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518, where it was sought to enjoin the city from granting certain franchises, the supreme court of the United States, speaking through Justice Harlan, uses this pertinent language at page 481:

"A court of equity cannot properly interfere with, or in advance restrain, the discretion of a municipal body while it is in the exercise of powers that are legislative in their character. It ought not to attempt to do indirectly what it could not do directly. In view of the adjudged cases, it cannot be doubted that the legislature may delegate to municipal assemblies the power of enacting ordinances that relate to local matters, and that such ordinances, if legally enacted, have

the force of laws passed by the legislature of the state, and are to be respected by all. But the courts will pass the line that separates judicial from legislative authority if by any order or in any mode they assume to control the discretion with which municipal assemblies are invested, when deliberating upon the adoption or rejection of ordinances proposed for their adoption. The passage of ordinances by such bodies are legislative acts which a court of equity will not enjoin."

The argument of learned counsel for plaintiff, wherein they contend that the matter of determining the highest bidder and to whom the franchise shall be granted is only ministerial or at most judicial, under this charter provision, and therefore may involve such an abuse of discretion on the part of the mayor and council as to call for interference by the courts, is plausible, and has been presented to us with marked ability. It has for its foundation, however, the assumption that the council was legally required to advertise for, invite bids, and offer to grant the franchise to the highest bidder, as prescribed in the freehold charter of the city. If the legislative authority of the city, to which the power to grant such franchises has been given by direct act of the legislature, was not required, as a matter of law, to determine to whom the franchise should be granted, in the manner provided by the charter, then there could be no such thing as an abuse of the discretion vested in the mayor and council, such as the courts could lawfully review, because that discretion would, in any event, then be purely legislative.

This brings us to the question, Was the legislative authority of the city legally required to follow the charter provisions in determining to whom it would grant the franchise? We have seen that the legislature has directly conferred upon the legislative authority of the city, by the acts of 1903 and 1907, power to grant such franchises, and also power to "*prescribe the terms and conditions on which such railroads or railways and their appurtenances shall be constructed, maintained and operated . . .*" If this legislative grant of power is superior to the limitations and restrictions con-

tained in the freehold charter, then it is evident, by its plain terms, that the legislative authority of the city was not legally required to follow the charter method in determining to whom it would grant such franchise, but could lawfully exercise its own judgment upon that question. And the fact that bids were invited and received in the manner provided by the charter would in no wise lessen the power of the legislative branch of the city government to ultimately determine the question in any way it saw fit. While our constitution has reserved to the people of cities of the class to which Seattle belongs the power to frame and adopt charters for their own government, it also provides that such charters "*shall be subject to and controlled by general laws.*" And this court has repeatedly and uniformly held that where the legislature has enacted laws relating to such cities, or to the powers and duties of their officers, such laws supersede charter provisions in conflict therewith. *State ex rel. Seattle v. Carson*, 6 Wash. 250, 33 Pac. 428; *Reeves v. Anderson*, 13 Wash. 17, 42 Pac. 625; *Tacoma Gas & Elec. Light Co. v. Tacoma*, 14 Wash. 288, 44 Pac. 655; *Hindman v. Boyd*, 42 Wash. 17, 84 Pac. 609; *Renton v. Seattle Electric Co.*, 50 Wash. 156, 96 Pac. 1033.

It seems to us the principle involved, and upon which these cases were decided, is decisive of this case. In the case last cited, acting under the power conferred by the Laws of 1903 and 1907 above quoted, the legislative authority of Seattle, that is the mayor and city council, enacted an ordinance granting a street railway franchise, without complying with the provision embodied in the amendment to the city charter of March, 1908, requiring certain conditions to be embodied in the franchise, and also requiring, under certain conditions, the submission of the question of granting of the franchise to a vote of the people of the city. These provisions of the charter being ignored, it was contended that the franchise was void, and it was sought to enjoin the grantee from proceeding to construct its railway thereunder. Referring to the scope

of the power given to the legislative authority of the city by these laws, at page 161 of that decision, the court said:

"These latter statutes vest in the 'legislative authority' of the city power to prescribe the terms and conditions upon which electric railroads and railways may be constructed, operated, and maintained. It is maintained that the expression 'legislative authority of the city' means the mayor and city council. This contention is doubtless correct. That expression as used in § 10, art. 11, of the state constitution and in numerous statutes of the legislature, undoubtedly means the mayor and council of the city. Bal. Code, § 740 (P. C. § 3733). . . . While the direct amendment statute vests power in the city to amend its charter, yet this cannot be construed to mean that the charter can be so amended as to override a statute of the legislature which was intended to and does deal directly and specifically with the subject-matter in question."

Then after noticing former decisions of the court as to the effect of general state laws upon freehold charter provisions, the opinion concludes with this language:

"This case is clearly distinguishable from that of *Hindman v. Boyd, supra*, wherein a charter amendment, adopted by the voters of the city, involved a gas franchise, there being no special statute of the legislature vesting the power over such matters directly and specifically in the 'legislative authority' of the city as is the fact in the case at bar. We think that, under the statutes of the state, the city council was without authority to submit to the voters for their ratification any ordinance granting a franchise for a street railway company, inasmuch as the power of granting franchises of this kind is vested directly and specifically by the legislature in the legislative authority of the city; that is, in the mayor and city council. For these reasons the ordinance granting the franchise involved in this action was legal and valid, and it was not necessary nor proper that it should have been submitted to the voters. Neither was it necessary to embody the restrictions and limitations provided for in said charter amendments adopted at the municipal election in March, 1908."

If that charter amendment did not legally require the legislative authority of the city to embody the conditions therein specified, in the franchise, and did not legally require the submission of the franchise to a vote of the people of the city, because of the broad powers given by the state legislature in these laws, then, upon the same principle, the legislative authority of the city was not legally required to invite bids for the franchise, nor legally required to grant the same to the highest bidder. If the charter provision does not limit or control the exercise of the power granted by the state law in the one instance, it is manifest it does not do so in the other. It having become the settled law of this state, by the construction repeatedly placed upon the constitution, that a general law enacted by the legislature is superior to and supersedes all freehold charter provisions inconsistent therewith, it becomes plain that, when the legislature, by the Laws of 1903 and 1907, gave to the legislative authority of the cities of the state the power to grant street railway franchises, and also the power to "*prescribe the terms and conditions on which such railways . . . shall be constructed, maintained and operated,*" that power cannot be limited or prescribed by freehold charter provisions. The legislative power given by these laws to the mayor and council, to grant such franchise, includes the power to name the grantee, which power, under such laws, is as purely legislative as any other part of the power conferred. To hold that a freehold charter provision may so limit this power as to reduce the exercise of it to a mere ministerial or at most a judicial act, thus rendering it reviewable by the courts, would be to take from the mayor and council a portion of the legislative power directly conferred upon them by a general law of this state.

Learned counsel for the plaintiff argue that the *Renton* case, last above cited as an authority in this case, is open to serious question for a reason not brought to this court's

attention in its presentation; to wit, that the title to acts of 1903 and 1907, upon which that decision rests, are not broad enough to support an enactment divesting the people of a freehold charter city of power to limit and control the legislative power of the city in granting street railway franchises. The title of the act of 1903, repeated in the amendatory act of 1907, is as follows:

"An act relating to electric railroads, street and other electric railways, and corporations incorporated for the construction, ownership or operation thereof, the right of eminent domain therefor, the use of streets and roads thereby and leases and sales thereof heretofore or hereafter made." Laws 1903, p. 364, ch. 175.

It seems to us that the words "An act relating to electric railroads, street and other electric railways. . . . *the use of streets and roads thereby*" etc., is sufficiently broad and comprehensive to bring the provision of the act relating to the granting of franchises for such railways by the legislative authority of cities clearly within the subject-matter so expressed in the title.

We are of the opinion that the order of the learned superior court granting the temporary injunction should be reversed, for the reasons that the acts of the legislative authority of the city so attempted to be enjoined are purely legislative, and therefore the courts have no lawful authority to enjoin the same. It is so ordered.

RUDKIN, C. J., CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 7954. *En Banc.* October 9, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Frederick V. Pindall, Plaintiff*, v. E. W. Ross, *Commissioner of Public Lands, Respondent.*[1]

PUBLIC LANDS — MINES AND MINERALS — LEASES — STATUTE—CONSTRUCTION. The commissioner of public lands is not limited in the execution of leases of state mineral lands, for prospecting purposes, to the government legal subdivisions of a section, by the proviso to Laws 1901, p. 313, authorizing the changing of boundaries to conform to the section lines, since the law permits a lease for "any amount not to exceed eighty acres," and should not be construed to authorize the leasing of other than mineral lands.

STATUTES—CONSTRUCTION BY EXECUTIVE DEPARTMENTS. The construction placed upon a statute by the executive department does not control the courts when it deprives a citizen of valuable rights accorded him by the law.

PUBLIC LANDS—MINES AND MINERALS—LEASES—DISCRETION. Laws 1901, p. 313, providing for the leasing of state lands to the discoverer of previous minerals, leaves no discretion in the commissioner of public lands where the law has been complied with.

Application filed in the supreme court March 22, 1909, to compel the commissioner of public lands to execute a lease for state lands containing deposits of minerals. Granted.

Myron A. Folsom and *Alex M. Winston*, for petitioner.

The Attorney General, for respondent.

PER CURIAM.—Section 2 of the act of March 17, 1897 (Laws 1897, p. 293), relating to the mineral lands of the state, provides that:

"Any citizen of the United States, finding precious minerals upon any lands belonging to the State of Washington, may apply to the commissioner of public lands for a lease of any amount of land not to exceed the amount of land allowed by the United States mining laws for locating and recording mining claims, and the same dimensions."

[1]Reported in 104 Pac. 216.

This section was amended by §1 of the act of March 18, 1901 (Laws 1901, p. 313,) to read as follows:

"Any citizen of the United States, finding precious minerals upon any lands belonging to the state of Washington, may apply to the commissioner of public lands for a lease of any amount not to exceed eighty acres for prospecting purposes, provided that said applicant has posted up location notice and set corner posts and marked boundary lines as required by the mining laws of the state of Washington: *Provided*, Any person, persons, or corporations to whom a lease or contract has been issued prior to the passage of this act may, by applying to the commissioner of public lands, have the boundaries of their mineral claims or lots changed to conform to the section lines as surveyed by the U. S. surveyors: *Provided*, The changing of boundaries does not infringe upon the rights of any other lease holder or assignee, and shall pay a fee according to the increased area which they may obtain."

On the 12th day of November, 1908, the relator discovered precious minerals on certain state lands in Stevens county, described as the south half of the northwest quarter, and the north half of the southwest quarter, of section 16, township 30, north, range 42, E. W. M., and located fifteen hundred feet in length along the vein or lode, and six hundred feet in width, marking the boundaries of the claim in conformity to the laws of the United States and of this state. He thereupon made application to the commissioner of public lands for a lease of the lands thus located, and tendered the fee prescribed by law. The application was rejected by the commissioner, on the sole ground that he had no authority under the law to execute a lease of any state lands other than a legal subdivision of a section according to public surveys. The relator thereupon applied to this court for a writ of mandamus, and the case is now before us for consideration on the foregoing facts, which are not controverted.

Three questions have been presented and discussed by counsel in their briefs and oral arguments: (1) Did the commissioner of public lands correctly construe the law; (2) should

this court adhere to and adopt the construction placed upon the law by the officer charged with its administration; and (3) has the commissioner a discretion in the matter of executing leases where the law has been fully complied with.

The first question must be answered in the negative. The original act of 1897 limited the quantity of land that might be included in any one lease to not exceed the amount "allowed by the United States mining laws for locating and recording mining claims, and the same dimensions." By §2320 of the Revised Statutes of the United States, mining claims upon veins or lodes of quartz, or other rock in place, cannot exceed fifteen hundred feet in length along the vein or lode, or three hundred feet on each side of the middle of the vein at the surface. Mining claims of this character must conform to the vein or lode, and it would be impracticable, if not impossible, to make them likewise conform to the public surveys. Congress recognized this difficulty, for §2327 of the Revised Statutes expressly provides that they need not. The laws of the state should not be so construed as to require or authorize the leasing of other than mineral lands for mining purposes, yet, under the construction adopted by the commissioner, it would be practically impossible to exclude nonmineral lands from mining leases.

It is very apparent that the original act of 1897 had no reference to the public surveys or legal subdivisions of sections, and the principal object of the amendatory act of 1901 was to enlarge the area that might be leased. There is nothing in the amendatory act indicating that the boundaries should be limited or controlled by the public surveys, except a proviso that persons who had obtained leases prior to its passage might have their boundaries changed to conform to section lines. This proviso does not, in our opinion, change the scope and meaning of the entire act, or limit the power of the commissioner to lease by legal subdivisions of sections only.

(2) We are not unmindful of the rule that the construc-

tion placed upon a statute by the department or officer charged with its administration is entitled to weight and consideration in the courts, but, as said by the supreme court of the United States in *United States v. Dickson*, 15 Pet. 141, 10 L. Ed. 689:

"The construction so given by the treasury department to any law affecting its arrangements and concerns, is certainly entitled to great respect. Still, however, if it is not in conformity to the true intendment and provisions of the law, it cannot be permitted to conclude the judgment of a court of justice . . . It is not to be forgotten that ours is a government of laws, and not of men; and that the judicial department has imposed upon it, by the constitution, the solemn duty to interpret the laws in the last resort; and however disagreeable that duty may be in cases where its own judgment shall differ from that of other high functionaries, it is not our liberty to surrender, or to waive it."

And in the case before us, we do not think that the erroneous construction adopted by the land commissioner should be permitted to deprive a citizen of a valuable right accorded to him by the laws of the state.

(3) Nor do we think the law has vested any discretion in the commissioner, where the applicant for a lease has fully complied with its provisions. The act was doubtless passed in pursuance of the liberal policy that has ever marked the conduct of the general government in disposing of its mineral land, and should be so construed as to effectuate the legislative intent. There is nothing in the act itself to indicate an intention on the part of the legislature to vest a discretion in the commissioner, and no harm can result from withholding it, while untold injury might result to individuals from its recognition.

The writ will therefore issue as prayed.

[No. 8087. Department One. October 11, 1909.]

EMELINE M. SHUFELDT *et al.*, *Appellants*, v. EDWIN HUGHES, *Executor etc.*, *Respondent*.[1]

WILLS—NONINTERVENTION WILL—EXECUTORS AND ADMINISTRATORS—NECESSITY OF ADMINISTRATION. Where a will devised property to two individuals, one of whom was not a trustee, and provided that if either refused to accept the trust, another be appointed in his stead by the court probating the will and settling the estate, the will is not a "nonintervention" will; since it is necessary under Bal. Code, § 6119, that the intention to dispense with administration be shown by express words or necessary implication.

WILLS—NONRESIDENTS—NECESSITY OF PROBATE. Where a nonresident testator dies leaving real estate in this state, it is necessary that his will be probated here.

EXECUTORS AND ADMINISTRATORS — COMPENSATION — WILLS. Bal. Code, § 6314, providing for commissions on the whole estate accounted for by an executor, where no compensation is provided for in the will or he shall renounce his claim thereto, applies to nonintervention wills, as well as to others.

SAME—WAIVER OF COMPENSATION—BURDEN OF PROOF. An executor having a legal right to probate a will without the consent of a widow, the burden of proof is upon her to show an alleged waiver of his statutory commissions under an agreement to accept a flat salary.

SAME—LIABILITIES OF ESTATE—ATTORNEY'S FEES—AMOUNT. In determining the amount of an attorney's fee to be allowed an executor, the court will take into consideration the value of the estate and the responsibility involved.

SAME. An allowance of $13,000 for the fees of an attorney for an executor is excessive, and $8,750 is sufficient, where it appears that the estate consisted of a city building, its rents, issues and profits, of the value of $600,000, that the attorney was learned in the law, and of thirty years' experience, that he probated the will, made an exhaustive inquiry as to the community nature of the estate, devoted considerable time to the question of the inheritance tax, attended to two suits, carried the estate to final settlement, was paid $1,750 up to the time of the final account, and $7,000 thereafter upon contest of the final account, which had once been vacated upon condition that the executor be allowed to credit on his account all subsequent disbursements, such order being conclusive upon the estate as to the items paid.

[1]Reported in 104 Pac. 253.

Appeal from a judgment of the superior court for King county, Morris, J., entered January 16, 1909, approving the final account of an executor, after a hearing before the court. Reversed.

Revelle, Revelle & Revelle, for appellants.

Chas. F. Munday, for respondent.

Gose, J.—This appeal is prosecuted from a decree approving the final account of the respondent and allowing executor's and attorney's fees. The testator, a resident of the state of Wisconsin, died on November 13, 1906. The will was admitted to probate in the county court of Waukesha county, Wisconsin, on the 18th day of December following. A copy of the will and of the original record of probate, authenticated as required by law, was filed in the superior court of King county, and admitted to probate on January 31, 1907. The order admitting the will to probate, in pursuance of the provisions of the will, the other executor therein named being a nonresident, appointed the respondent as sole executor, and directed that letters testamentary issue to him upon his taking and subscribing an oath as provided by law. The oath was taken by the respondent on the day of the date of the order. Thereupon notice was given to the creditors, an inventory was filed, the estate was appraised, and the execution of the will proceeded in the usual and ordinary way.

On March 25, 1908, the final account was filed, with a petition and prayer that it be settled and allowed. On the day following, an order was entered fixing the 16th day of April as the time for the hearing and settlement of the account, and directing the proper notice to be given. On May 28, Emeline M. Shufeldt, the widow of the testator, filed her objections to the account. On July 9 following, William B. E. Shufeldt filed a statement uniting in such objections. The substance of the objections was, (1) that under

the will it was the duty of the executor to report to the county court of Wisconsin, where the will was first probated; (2) that it is a nonintervention will, the respondent acting as trustee, and that he is not entitled to the statutory commission as executor; (3) that the respondent agreed to accept a flat salary in lieu of the statutory compensation. The prayer was that the account be disallowed, and that no compensation in excess of $500 be allowed, either to the executor or to his attorney. On June 1, 1908, the executor answered, joining issue upon the objections. On August 28 following, the executor filed his supplemental account, and a hearing was had upon the account and the supplemental account, and on August 29 following, a decree was entered settling and allowing the same. The decree recited:

"Emeline Shufeldt having filed herein her objections to said account, and on July 7th, 1908, W. B. E. Shufeldt having filed herein objections to said account, and on August 28th, 1908, said executor having filed his answer thereto duly verified, and said executor having filed herein an account supplementary to his said final account showing all his receipts and disbursements from the date of the said final account down to and including this date; and said matter having come regularly on to be heard on August, 28th, 1908, at 1:30 o'clock p. m. said executor appearing in person and by Chas. F. Munday, his attorney, and no one appearing in behalf of said objectors, or either of them, and no testimony or other proof being offered on behalf of said objectors, or either of them, in support of their said objections, and said objections being abandoned. It is now ordered that said objections and each and every of them be and the same hereby are overruled:"

and fixed the executor's commission at $25,251.75, less whatever sum he had theretofore received on account thereof; and fixed the attorney's fees at $12,500, less the sum of $1,750 theretofore paid, and directed the executor to pay the same. On September 17 following, the objectors filed a motion to vacate the decree, which was heard and granted on

the 28th day of September. The order granting the motion to vacate recited:

"It is now by the court, after due consideration, ordered that said decree so made and entered on August 29, 1908, be and the same is hereby vacated and set aside, upon one condition, however, that the executor Edwin Hughes be allowed credit in his account for any and all disbursements which he has made subsequent to August 29, 1908."

After a hearing on the account and on January 16, 1909, a decree was entered overruling the objections, and fixing $13,000 as reasonable compensation for the services of the attorney for the executor, and fixing the commission of the executor at $25,553.25, the statutory commission, less whatever sum he had theretofore received on account thereof, and directing the executor to pay such sums.

The will, so far as is necessary for a proper understanding of the case, is as follows:

"(2) All the residue of my estate, real and personal, I devise and bequeath to my wife, Emeline M. Shufeldt, to have and to hold for her own use during her life; and I do authorize her, as her own best judgment may dictate, to sell, exchange or dispose of all live-stock, all perishable property and all articles subject to become useless or worthless by the ordinary use and wear thereof, without accounting, by her or her estate to any residuary legatee herein designated for any portion thereof; also I do authorize her to collect, exchange or sell any stocks, bonds, notes, mortgages, or other assets, and to reinvest the proceeds thereof in income-bearing property for the benefit of my estate.

"(3) Upon the decease of my said wife, if she survive me, or upon my decease if she do not survive me, I give and bequeath all my estate, not hereinbefore specifically devised, as follows:

"(A) To my daughter, Mary Shufeldt Hartshorne, or to her issue if she be then deceased leaving issue, the sum of fifty thousand dollars, to be paid from my personal estate.

"(B) To my daughter, Emeline Shufeldt Hughes, a half interest, during her life, in the income and proceeds of the lots and building known as the Butler Block, in the city of Seattle, state of Washington.

"(C) I do hereby will and bequeath the said Butler Block and the lots upon which it stands to my son, William B. E. Shufeldt and my son-in-law Edwin Hughes, to have and to hold the same to them and their assigns forever, in trust, for the uses and purposes as follows:

"During the life of my wife, Emeline M. Shufeldt, the said trustee shall pay to her the net income from said block, as per article number 2 of this will.

"If either of said trustees refuse to accept said trust, or be rendered incapable by death or other causes to fulfill the same, then I direct a trustee be appointed in his stead by the court probating this will and settling my estate, and such trustee shall have all the title and power herein conferred upon either trustee herein named.

"I nominate my son, William B. E. Shufeldt, and my brother-in-law, Samuel E. Egan, to be executors of this will."

By a codicil the nomination of Samuel E. Egan was revoked, and in his place Edwin Hughes was nominated as executor.

The appellants urge three propositions, viz: (1) That the court had no jurisdiction to enter a decree; (2) that the executor is not entitled to a commission, and (3) that the attorney's fees allowed by the court are excessive. We will consider these points *seriatim*.

In support of the first proposition, it is argued that it was the intention of the testator upon his death to vest in the trustees named in section C of the will the legal title and possession of the property known as the Butler Block, and that the management of the property is cognizable only in a court of equity, citing *Smith v. Smith*, 15 Wash. 239, 46 Pac. 249; *Moore v. Kirkman*, 19 Wash. 605, 54 Pac. 24; *State ex rel. Phinney v. Superior Court*, 21 Wash. 186, 57 Pac. 337; *Seattle v. McDonald*, 26 Wash. 98, 66 Pac. 145, and *Martin v. Moore*, 49 Wash. 288, 94 Pac. 1087. In the *Kirkman*, *Phinney* and *McDonald* cases the will expressly provided that the executors should execute the will without the intervention of the probate court. In the *Smith* case the entire estate was devised to the executors in trust for

certain specified uses. In the *Martin* case the will, devising to a daughter, "The one-half of the proceeds of lots when sold of the undivided one-third interest of lots in Pullman unsold at my death," and to a son, "The one-half of proceeds of lots when sold, of the undivided one-third of Pullman lots unsold at my death, his share of said proceeds to be invested to make a fund for him when he becomes of age"; and providing: "I do hereby designate and appoint my brother Miles C. Moore the executor of this my last will and testament. I do hereby request and expressly provide and direct that no bond or other security be required of him, and so far as by law in any case can be done he be relieved from the supervision and control of all courts," was construed to be a non-intervention will, with the power of sale in the executor.

In the instant case, in the original will one of the executors was not named as a trustee, and there is nothing in the will indicating an intention in the testator to make the will a non-intervention one, but there is express language showing his intention to have the will regularly probated. Such intention is found in the words heretofore quoted, viz: "If either of said trustees refuse to accept said trust . . . then I direct a trustee be appointed in his stead by *the court probating this will and settling my estate.*" (The italics are ours.) There are two methods of probate in this state. One method is where the executor executes the will subject to the control of the court, until the estate has been settled, and the property distributed. The other method is that provided by our code, Bal. Code, § 6196 (P. C. § 2489), the applicable part of which is as follows:

"In all cases where it is provided in the last will and testament of the deceased that the estate shall be settled in a manner provided in such last will and testament, and that letters testamentary or of administration shall not be required, and where it also duly appears to the court, by the inventory filed, and other proof, that the estate is fully solvent, which fact may be established by an order of the court on the coming in of the inventory, it shall not be necessary to take out

letters testamentary or of administration, except to admit to probate such will, and to file a true inventory of all the property of such estate in the manner required by existing laws. And after the probate of such will and the filing of such inventory all such estates may be managed and settled without the intervention of the court, if the said last will and testament shall so provide."

There was no devise to the executors. Certain property was devised to two individuals as trustees, one of whom, in the original will, was not an executor. It is clear, therefore, that it was not the intention of the testator, at the time he executed the will or codicil, to dispense with administration. An intention to do so must be evidenced by express words or by necessary implication. The respondent was the only resident executor. Under the terms of the will he could elect to act as executor and decline to serve as trustee.

"If from the will it appears that the testator intended to give his trustees a distinct and independent character, probate of the will by the executors will not make them trustees. . . . If the trust is given to one named, and the same person is afterwards appointed executor, the trust is not annexed to the office of executor." 1 Perry, Trusts (4th ed.), §§ 262-3.

"An executor, who is also a trustee under the will, cannot be considered as holding any part of the assets in the latter capacity, until he has settled an account at the probate office as executor, in which he is credited as executor with the amount which he holds as trustee." *Hall v. Cushing*, 9 Pick. 395.

"But a person may be appointed both executor and trustee under a will in such a manner as to enable him to accept one of the appointments and to decline the other. If it appears from the will that the testator intended to give the trustees a distinct and independent character, the taking out of probate by the executors will not serve to make them trustees unless they expressly accept the trust and qualify as trustees. . . . Where a trust is given to a person by name, and he is subsequently appointed executor, the trust will be held as distinct from the executorship." 2 Beach, Trusts and Trustees, p. 885, § 378.

See, also, *In re Higgins Estate*, 15 Mont. 474, 39 Pac. 506, 28 L. R. A. 116. Moreover, upon any construction, it was necessary to have the will admitted to probate in this state. Bal. Code, § 6196 (P. C. § 2489); *State ex rel. Mann v. Superior Court*, 52 Wash. 149, 100 Pac. 198.

An executor is a person appointed to carry the will into effect or execution after the death of the testator, and to dispose of his estate according to its tenor. *In re Lamb's Estate*, 122 Mich. 239, 80 N. W. 1081. Our statute relating to the compensation of executors was not before the court or construed in either of the cases cited by the appellants. Whether the instrument be construed as an ordinary will or a nonintervention one, will not affect the right of the executor to the statutory commission. Our code, Bal. Code § 6314 (P. C. § 2636), provides that, when no compensation shall have been provided by will, or the executor shall renounce his claim thereto, he shall be allowed commission on the whole estate accounted for by him in the amount therein fixed. In the instant case no compensation was provided by will for the executor. We cannot by construction exempt nonintervention wills from the plain terms of the statute. Upon either construction the law fixes the compensation where it is not fixed by the will.

It is next contended that the executor, by an agreement with the testator's widow, waived his right to the statutory commission and agreed to accept a flat salary in lieu thereof. He had a legal right to probate the will without her advice or consent. It is true he could waive the statutory compensation and accept a salary or a fixed, definite sum in lieu thereof. The burden, however, of showing this rested on the objectors. The widow did not testify. Without reviewing the evidence, it is sufficient to say that we agree with the learned trial court that the waiver was not established by a preponderance of the evidence, and that the executor is entitled to the commission provided by statute and allowed by the court.

It is finally urged that the compensation allowed the executor for the services of his attorney is excessive. The record shows from the nature of the duties performed by the attorney, that it was necessary for the executor to employ him, and he is entitled to an allowance for the reasonable value of the services rendered by the attorney. *Noble v. Whitten*, 38 Wash. 262, 80 Pac. 451. It is admitted that the estate consisted of the Butler Block, of the value of $600,000, and its rents, issues, and profits. The appellants argue that the value of the estate cannot be considered in fixing the compensation to be paid to the executor for the attorney's services. We cannot yield our assent to this view, but agree with the respondent that, in determining the amount of the fee, "it is proper to consider the time and labor required, the novelty and difficulty of the questions involved, and the skill required to properly conduct the case, and the amount involved in the controversy." It cannot be denied that the responsibility of an attorney is greater in a large estate than in a small one. It seems reasonable, therefore, that his compensation should be commensurate with his responsibility. This principle was recognized in *Sullivan v. Sullivan*, 52 Wash. 160, 100 Pac. 321, where we said:

"In view of the nature of the action and the amount of property involved, it cannot be said that the allowance for attorney fees is unreasonable or excessive."

The record shows, that the respondent's attorney is learned in the law; that he has had thirty years' experience at the bar; that he prepared the papers for probating the will; that he made a careful and exhaustive investigation as to whether the property was community or separate, before filing the inventory; that the determination of this question involved an examination of the statutes and decisions of three states; that he devoted considerable time to the question of the amount of inheritance tax collectible from the estate and the different interests; that he went over this matter two or three times with one of the tax commissioners, and made a trip to

Olympia; that he briefed and commenced two independent suits, one in the Federal court, the other in the state court, to have determined the right to the use of the word "Butler" on the Butler Annex, neither of which was appealed; that he prepared an answer to the objectors against final settlement, and prepared numerous affidavits against the application to vacate the first decree; that he went to Milwaukee on a stipulation to take the testimony of the objectors' witnesses, but not solely for that purpose; that he was consulted almost daily by the executor upon questions arising in the execution of the will; that he carried the estate to final settlement, and performed all the usual duties of an attorney in an estate. Witnesses, members of the bar, gave evidence, both for the objectors and for the respondent, as to the value of the services rendered. The objectors' witnesses fixed the value of the services at five to six thousand dollars, whilst the respondent's witnesses estimated the value of the services at $15,000. As we have seen, $13,000 was allowed.

The vacation of the first decree of settlement was largely in the discretion of the court. The time of settlement of the account had been fixed by proper notice, and thereafter continued from time to time until August 28, 1908, when a hearing was had and a decree entered, the objectors failing to appear. In vacating the decree and granting leave to the objectors to defend, the court could annex any reasonable condition. We have seen that the condition fixed by the court was that the "executor be allowed credit on his account for any and all disbursements which he has made subsequent to August 29, 1908." Prior to the entry of the first decree, the executor had paid his attorney $1,750, and subsequent thereto and prior to its vacation he had paid him an additional sum of $7,000, making in the aggregate $8,750. We regard these payments as binding upon the estate and conclusive against it and the objectors. From a careful examination of the entire record, we think that $8,750 is reasonable and adequate compensation for the services of the attorney.

It follows that the court erred in allowing the executor $13,000 for attorney's fees. The view we have expressed makes it unnecessary to consider other cases cited and relied upon by the appellants, or to discuss the many interesting questions raised by them as to the construction of the will in other respects.

The decree will be reversed, and the case remanded with directions to the lower court to enter a decree in conformity with this opinion.

RUDKIN, C. J., CHADWICK, and FULLERTON, JJ., concur.

MORRIS, J., took no part.

[No. 7911. Department Two. October 11, 1909.]

ELLING NELSON *et al.*, *Respondents*, v. HENRY C. BROMLEY, *Appellant*.[1]

TRIAL—VERDICT—SEVERAL DEFENDANTS—FORMS—OBJECTIONS. In an action for personal injuries against several defendants who could have been held jointly or severally, if all were guilty of negligence, a verdict against one only, not objected to at the time, is not fatally defective for failing to dispose of the issues as to the other defendants.

APPEAL—PARTIES ENTITLED—ERROR NOT AFFECTING APPELLANT. A defendant jointly and severally liable, against whom a verdict and judgment was rendered, cannot complain of the dismissal of the action as to the other defendants.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,500 for the loss of part of the great toe and a crippled condition of the foot causing a perceptible limp, is excessive and should be reduced to $2,500, where it appears that the plaintiff was 29 years of age, employed at $9 per week with a promise of an increase to $12 or $15, that she was in a hospital five weeks, gangrene required several operations, and she suffered considerably.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 12, 1908, upon the

[1]Reported in 104 Pac. 251.

verdict of a jury rendered in favor of the plaintiffs, for $3,500 for personal injuries sustained through an obstruction placed upon a sidewalk. Reversed, and a new trial ordered unless $1,000 is remitted.

F. S. Blattner, L. F. Chester, and *L. B. da Ponte,* for appellant.

William B. Bebb and *Edwin H. Flueck,* for respondents.

Crow, J.—This action was commenced by Elling Nelson and Eleanor S. Nelson, husband and wife, against Henry C. Bromley, M. Seller & Co., a corporation, and Eyres Transfer Company, a corporation, to recover damages for personal injuries sustained by the plaintiff Eleanor S. Nelson. The jury returned a verdict for $3,500 in favor of the plaintiffs, against the defendant Henry C. Bromley only. From the final judgment entered thereon, he has appealed.

Appellant, by his first assignment of error, contends that the verdict and the judgment entered thereon are fatally defective, in that they fail to dispose of the issues as to all of the defendants. The respondents alleged that the injuries sustained were the result of negligent acts of all defendants. The jury returned the following verdict:

"We, the jury in the above entitled cause, do find for the plaintiff in the sum of thirty-five hundred dollars against the defendant Henry C. Bromley ($3,500)."

On this verdict judgment was entered in favor of the respondents against the appellant Bromley. The judgment further ordered "that the defendants M. Seller & Co. and Eyres Transfer Company recover from plaintiffs their legitimate costs and disbursements." This being an action in tort, the defendants, if all guilty of negligence, could have been held liable jointly and severally. No objection was made to the form of the verdict when it was returned and filed. The order awarding costs to the other defendants disposed of the case as to them. The appellant is in no position to complain

of the disposition made of the issues as to them, if they are satisfied.

Appellant further insists that the damages are excessive. We think this contention should be sustained. The respondent was injured while walking on a public sidewalk on Second avenue, near University street, in the city of Seattle. Servants of the appellant, who is a contractor and builder, had left two large timbers on the walk, in an unsafe position. One of them fell upon respondent, injuring her foot, making it necessary to amputate about three-fifths of the great toe. Some further injury to the upper portion of the foot caused gangrene to set in, made other surgical operations necessary, and left the foot in a crippled, tender and sensitive condition although now healed. The respondent, who is about twenty-nine years of age, had been employed at $9 per week, and had a promise of an advance in wages to $12 or $15 per week. She was in the hospital for five weeks and suffered considerably. In *Smith v. Dow*, 43 Wash. 407, 86 Pac. 555, this court held that a verdict awarding $1,600 damages for the loss of the middle toe and the bruising of three others was excessive. The evidence here is that a loss of the great toe will cripple a person more severely and cause a more perceptible limp in walking than would the loss of any other. The injury sustained by the respondent is more severe than that sustained by the plaintiff in *Smith v. Dow, supra*. We are, nevertheless, constrained to hold that the damages here awarded are excessive, and that they should be reduced, or that a new trial should be ordered.

By reason of the excessive verdict, the cause is remanded for a new trial, unless the respondent, within thirty days after the filing of the remittitur in the superior court, shall remit $1,000 from the judgment, in which event a judgment for $2,500 will stand affirmed. The appellant will recover his costs in this court.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 7988. Department One. October 11, 1909.]

P. J. FRANSIOLI, *Appellant*, v. R. M. THOMPSON *et al.*, *Respondents*.[1]

PRINCIPAL AND SURETY—BONDS FOR THE PERFORMANCE OF PUBLIC WORK—RELEASE OF SURETY—CHANGE IN CONTRACT. Where a contract for improving a city street provided for comparatively cheap cedar cribbing, a radical change by the substitution by the city authorities of an expensive concrete retaining wall, after the principal contractors had sublet the work, will relieve the principal contractors and their sureties from liability on their bond to parties furnishing cement to the subcontractors for the construction of the work.

MUNICIPAL CORPORATIONS—IMPROVEMENTS—LIABILITY FOR MATERIAL—FAILURE TO REQUIRE BOND—CHANGE OF PLANS. Under Bal. Code, §§ 5925-5927, making a city liable for the cost of material furnished to a contractor on city work, if the city fails to require the contractor to enter into a bond to secure the same, the city is liable for materials furnished for additional work, where, after letting a contract and taking the bond, the city ordered such radical changes in the work as to release the sureties on the bond taken, and failed to require a new bond to cover the additional liability created by the change in plans.

SAME—DEFENSE—ESTOPPEL—ACCEPTANCE OF WORK. In such a case, the city is estopped to assert that the change was not authorized, where it accepted and paid for the work.

SAME—DEFENSES—SPECIAL FUND. The liability of a city for failure to take a bond to protect materialmen on public work is not affected by the fact that the work was to be paid for by special assessments on the property benefited.

ACTIONS—MISJOINDER OF CAUSES—PARTIES. The joinder of improper parties, on a theory of their liability that would exonerate other parties liable, does not constitute a misjoinder of causes of action; the plaintiff being entitled to join all persons connected with the matter whom he conceived to be liable.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 9, 1908, upon sustaining demurrers to the complaint, dismissing an action on contract. Affirmed in part and reversed in part.

[1]Reported in 104 Pac. 278.

Loveday, Kelley & McMillan, for appellant. The action is equitable in nature, for foreclosure of a lien rather than an action upon the bond, and the complaint is to be measured accordingly. *Gilmore v. Westerman*, 13 Wash. 390, 43 Pac. 345; *Ihrig v. Scott*, 5 Wash. 584, 32 Pac. 466; *Griffith v. Rundle*, 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381. The bond performs a double function and the sureties are not released by changes in the plan of the work. *Griffith v. Rundle, supra; United States, Use of Phoenix Iron Co. v. California Bridge & Construction Co.*, 152 Fed. 559; *United States, Use of Anniston Pipe & Foundry Co. v. National Surety Co.*, 92 Fed. 549; *United States, Use of Fidelity Nat. Bank v. Rundle*, 100 Fed. 400; *Henningsen v. United States Fidelity & Guaranty Co.*, 143 Fed. 810; *United States, Use of Standard Furniture Co. v. Aetna Indemnity Co.*, 40 Wash. 87, 82 Pac. 171. The contract is to be interpreted liberally in favor of the liability. *United States Fidelity & Guaranty Co. v. United States*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *United States v. American Surety Co.*, 200 U. S. 197, 26 Sup. Ct. 168, 50 L. Ed. 437; *City Trust Safe Deposit & Surety Co. v. United States, Use of Bryant*, 147 Fed. 155. The city can do no act to impair the obligation of the bond taken. *Conn v. State ex rel. Stutsman*, 125 Ind. 514, 25 N. E. 443; *Dewey v. State ex rel. McCollum*, 91 Ind. 173; *Doll v. Crume*, 41 Neb. 655, 59 N. W. 806; *Kauffmann v. Cooper*, 46 Neb. 644, 65 N. W. 796; *Steffes v. Lemke*, 40 Minn. 27, 41 N. W. 302; *Bell v. Kirkland*, 102 Minn. 213, 113 N. W. 271, 120 Am. St. 621, 13 L. R. A. (N. S.) 793.

Chas. W. Stewart, for respondents Thompson & Langford, contended, among other things, that the principal contractors do not stand in the position of a compensated surety, and are discharged by material changes in the obligation. *Peters v. Mackay*, 20 Wash. 172, 54 Pac. 1122; *United States v. Freel*, 99 Fed. 237; *United States, Use of Schumacker v. McIntyre*, 111 Fed. 590; *Miller-Jones Furniture*

Co. v. Ft. Smith Ice & Cold Storage Co., 66 Ark. 287, 50 S. W. 508; *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409; *Erfurth v. Stevenson*, 71 Ark. 199, 72 S. W. 49; *Bragg v. Shain*, 49 Cal. 131; *Brennan v. Clark*, 29 Neb. 385, 45 N. W. 472; *Gray v. School District*, 35 Neb. 438, 53 N. W. 377; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Board of Com'rs of Morgan County v. Branham*, 57 Fed. 179; *St. Mary's College v. Meagher*, 11 Ky. Law 112, 11 S. W. 608.

E. R. York and *John P. Hartman*, for respondent Empire State Surety Co., cited: *City of Winona v. Jackson*, 92 Minn. 453, 100 N. W. 368; *Beals v. Fidelity & Dep. Co.*, 76 App. Div. 526, 78 N. Y. Supp. 584; *Philadelphia v. Malone*, 214 Pa. St. 90, 63 Atl. 539; *United States v. National Surety Co.*, 92 Fed. 549; *United States Fidelity & Guaranty Co. v. United States*, 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242; *Simonson v. Grant*, 36 Minn. 439, 31 N. W. 861; *Friendly v. National Surety Co.*, 46 Wash. 71, 89 Pac. 177, 10 L. R. A. (N. S.) 1160; *Morgan County v. McRea*, 53 Kan. 358, 36 Pac. 717; *Evans v. Graden*, 125 Mo. 72, 28 S. W. 439; *Southern Bridge Co. v. Bogenshot* (Tenn. Ch. App.), 48 S. W. 97; *Miller-Jones Furniture Co. v. Ft. Smith Ice Co.*, 66 Ark. 287, 50 S. W. 508; *Burnes' Estate v. Fidelity & Deposit Co.*, 96 Mo. App. 467, 70 S. W. 518; *Luling Oil & Mfg. Co. v. Gohmert* (Tex. Civ. App.), 110 S. W. 772; *United States v. Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; *O'Neal v. Kelley*, 65 Ark. 550, 47 S. W. 409; *Beers v. Wolf*, 116 Mo. 179, 22 S. W. 620; *House v. American Surety Co.*, 21 Tex. Civ. App. 590, 54 S. W. 303; *Erfurth v. Stevenson*, 71 Ark. 199, 72 S. W. 49.

T. L. Stiles, F. R. Baker, and *F. A. Latcham*, for respondent City of Tacoma.

FULLERTON, J.—The appellant brought this action to recover the price of certain cement, sold by him to one C. D.

Elmore and used in the construction of a concrete retaining wall erected by Elmore as a part of a street improvement in the city of Tacoma. To his amended complaint demurrers were interposed by the several defendants, which demurrers the trial court sustained. The appellant thereupon elected to stand on his complaint, when judgment of dismissal and for costs was entered against him. The ultimate question for determination, therefore, is, does the amended complaint state a cause of action against the respondents, or either of them.

In substance, it is alleged in the complaint that the city of Tacoma entered into a contract with the respondents Thompson and Langford, whereby Thompson and Langford agreed to grade and otherwise improve a certain street of that city according to plans and specifications agreed upon, for a consideration of $6,975, and that these respondents, together with the respondent The Empire State Surety Company, entered into the statutory bond with the city of Tacoma, conditioned, among other things, to pay for all material that should be used in the construction of the improvement; that subsequent thereto, the respondents Thompson and Langford sublet the grading of a part of the street to one C. D. Elmore; that after the contract had been sublet, the city of Tacoma, by its commissioner of public works, made a change in the original plans and specifications under which the work was to be executed, by substituting a concrete retaining wall for a wall of cedar cribbing provided for in the original specifications, without taking an additional bond to cover the cost of making the change; that thereafter, and between June 26, 1907, and August 5, 1907, the appellant sold and delivered to Elmore six hundred and twenty barrels of cement, of the reasonable value of $1,660.08, to be used in, and which were actually used in, the construction of the substituted concrete wall; that the cement was not paid for, and prior to thirty days after the work performed by the contractor had been accepted by the city, the appellant served a notice in writing

upon the city, notifying it that it had a claim in the sum of $1,660.08 against the contractors for the amount so furnished; that before commencing his action he demanded of the respondents, and each of them, payment for the cement sold the contractor, but payment was refused.

The demurrer of the respondents Thompson and Langford and the respondent The Empire State Surety Company was sustained by the court on the ground that the change made in the plans and specifications for the improvement of the street, by which a concrete retaining wall was substituted for a retaining wall of cedar cribbing, was such a radical variance in the terms and conditions of the contract as to relieve the bondsmen of the obligation to pay for the material used in the substituted wall. The demurrer of the city was sustained on the ground that two causes of action had been improperly united in the complaint.

The ruling of the court on the demurrers of Thompson and Langford and The Empire State Surety Company is thought to be erroneous under the authority of the case of *Griffith v. Rundle*, 23 Wash. 453, 63 Pac. 199, 55 L. R. A. 381. But that case is not authority for the principle that no change in a contract for a public improvement can relieve from liability the persons who have executed the statutory bond conditioned for the payment of materials used in making the improvement. On the contrary, the rule still is that, where a bond is executed to secure the cost of the performance of a particular work, the bondsmen cannot be held for the cost of performing an entirely different work. Slight or immaterial changes in a contract of this kind, of course, do not affect the liability of the bondsmen, but a radical change, such as the substitution of an entirely different thing for the thing contracted for, will work that result. In this case the complaint shows in detail the changes made in the character of the work. It appears therefrom that the change was radical, that it substituted an expensive bulkhead for one that was comparatively cheap, and it is impossible to say at this time

whether there would have been a deficiency at all had the city adhered to the plans and specifications adopted at the time the bond was given. Since neither Thompson and Langford, nor The Empire State Surety Company, were liable to the appellant for the materials furnished by him other than such liability as the bond created, it follows that their demurrers were rightly sustained by the court.

The demurrer of the city we think should have been overruled. By the terms of the statute (Pierce's Code, §§ 6121, 6122, 6123; Bal. Code, §§ 5925, 5926, 5927), the city, on letting a contract for the grading of one of its streets, is obligated to take a bond from the contractor to pay the materialmen who furnish material for use in the making of the improvement, under the penalty of itself becoming liable for the cost of the materials so furnished. In the instant case, in so far as this concrete wall is concerned, the city stands in the position of having failed to require a bond to be furnished, as it suffered such a radical change to be made in the original plans as to relieve the bondsmen of their obligation to pay the costs of construction under those plans, and failed to take a bond to cover the additional liability created by the change of plans. We are aware that the city contends that the commissioner of public works had no authority to allow a change in the plan of construction, and that, as a consequence, his acts in that regard are not binding on the city, and create no additional liability on its part. But an inspection of the specifications, which are set out in the complaint, show that the commissioner had general powers of supervision; that he was the person to whom the letting of the contract was intrusted; the person who had power to accept or reject bids for the work; the person with whom the surety bonds must be filed and approved, and the person who must finally approve the work. Moreover, the work was completed and accepted by the city according to the change in the plans, and clearly it is estopped to contend that the change was not authorized. Nor is the right of the material-

man to hold the city affected by the fact that the cost of the improvement was to be paid by assessments upon the abutting property. The city became liable by its neglect to comply with the terms of a statute intended to protect materialmen; and this liability cannot be affected by the manner in which it proposed to raise funds with which to pay the general cost of the improvement.

The claim that there was a misjoinder of causes of action is also untenable. In this state the proper way to state a cause of action is to set forth in the complaint in plain and concise language the facts giving rise to the action, and when this is done, the complaint is judged by the facts pleaded, and not by any technical rule obtaining under the common law. The fact that other defendants were brought in and sought to be held on a theory that would exonerate the city does not affect the result. The complainant had the right to make parties defendant all persons connected with the contract whom he conceived to be liable, set forth in his complaint the facts which constituted his cause of action, and take the judgment of the court on the liability of the several defendants, even though a ruling holding one liable must of necessity exonerate the others. The plaintiff was not obligated to determine the legal questions involved, at his peril. He had the right to set out the facts and submit the legal questions to the judgment of the court.

The judgment appealed from is affirmed as to all the respondents other than the City of Tacoma; as to the City of Tacoma the judgment is reversed, and the cause remanded with instructions to reinstate the same, and require the respondent city to answer to the merits of the complaint.

RUDKIN, C. J., MORRIS, CHADWICK, and GOSE, JJ., concur.

[No. 7994. Department One. October 11, 1909.]

MOSES HOLLAND *et al.*, *Appellants*, v. NORTHERN PACIFIC RAILWAY COMPANY *et al.*, *Respondents*.[1]

RAILROADS—ACCIDENT AT CROSSING—NEGLIGENCE—FAILING TO SIGNAL AT CROSSING—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by one driving in a buggy and struck by a passenger train at a crossing, there is no sufficient evidence of negligence or that the bell was not rung or the whistle blown, and a verdict for defendant is properly directed, where it appears from the plaintiff's testimony that when she stopped at the crossing to look and listen, the wind was blowing such a gale in the direction of the train and raising such clouds of dust that "you could not see or hear," and the only other evidence on the subject was that of a passer-by, half a mile distant, who was paying no attention to the train, and who testified that he did not hear the whistle; negligence in failing to whistle or ring the bell not being presumed and depending on the circumstances of each case.

Appeal from a judgment of the superior court for Adams county, Kauffman, J., entered February 13, 1909, upon the verdict of a jury rendered in favor of the defendants, by direction of the court, in an action for personal injuries resulting from a collision at a railway crossing. Affirmed.

W. H. Plummer and *F. H. McDermont*, for appellants, cited, among other cases: 10 Ency. of Evidence, p. 468; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 38, 29 Pac. 942; *Hendrickson v. Great Northern R. Co.*, 49 Minn. 245, 51 N. W. 1044, 32 Am. St. 540, 16 L. R. A. 261; *Cameron v. Great Northern R. Co.*, 8 N. D. 124, 77 N. W. 1016; *Newstrom v. St. Paul & D. R. Co.*, 61 Minn. 78, 63 N. W. 253; *Parsons v. New York Cent. etc. R. Co.*, 113 N. Y. 355, 21 N. E. 145, 10 Am. St. 450, 3 L. R. A. 683; *Atchison etc. R. Co. v. Hague*, 54 Kan. 284, 38 Pac. 257, 45 Am. St. 278; *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Hencke v. Babcock*, 24 Wash. 556, 64 Pac. 755; *Chesholm v.*

[1]Reported in 104 Pac. 252.

Seattle Elec. Co., 27 Wash. 237, 67 Pac. 601; *Christianson v. Pacific Bridge Co.*, 27 Wash. 582, 68 Pac. 191; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Lambert v. La Conner Trading & Transp. Co.*, 30 Wash. 346, 70 Pac. 960; *Lynch v. Kineth*, 36 Wash. 368, 78 Pac. 923, 104 Am. St. 958; *Redford v. Spokane St. R. Co.*, 15 Wash. 419, 46 Pac. 650; *Texas & Pac. R. Co. v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132; *Steele v. Northern Pac. R. Co.*, 21 Wash. 287, 57 Pac. 820.

Cannon & Lee, for respondents, cited: *Kinter v. Pennsylvania R. Co.*, 204 Pa. St. 497, 54 Atl. 276, 93 Am. St. 795; *Pennsylvania R. Co. v. Beale*, 73 Pa. St. 504, 13 Am. Rep. 753; *Ellis v. Lake Shore & M. S. R. Co.*, 138 Pa. St. 506, 21 Atl. 140, 21 Am. St. 914; *Lehigh Valley R. Co. v. Brandtmaier*, 113 Pa. St. 610, 6 Atl. 238; *Carlson v. Chicago & N. W. R. Co.*, 96 Minn. 504, 105 N. W. 555, 113 Am. St. 655, 4 L. R. A. (N. S.) 349; *Guhl v. Whitcomb*, 109 Wis. 69, 85 N. W. 142, 83 Am. St. 889; *Flemming v. Western Pac. R. Co.*, 49 Cal. 253; *Mankewicz v. Lehigh Valley R. Co.*, 214 Pa. St. 386, 63 Atl. 604; *McCrory v. Chicago, M. & St. P. R. Co.*, 31 Fed. 531; *Chicago & N. W. R. Co. v. Andrews*, 130 Fed. 65, 73; *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058.

FULLERTON, J.—The appellant Della Holland, while crossing the track of the respondent Northern Pacific Railroad Company, in a buggy, was run into by a passenger train and injured, and this action was brought to recover damages therefor. On the trial, at the close of the appellants' case in chief, the jury, at the direction of the court, returned a verdict for the respondents, and from the judgment entered thereon, this appeal is taken.

The facts of the case are simple. Mrs. Holland and a woman companion left the town of Ritzville, Adams county, in an open buggy drawn by a single horse, shortly after

eleven o'clock on the day of the accident, intending to drive a short distance into the country to a farm house. As they left the town they drove along a county road running parallel to the railroad track, for a distance of about a mile, to a point where the road turned to the right and crossed the railroad. There they stopped, looked and listened, and not seeing or hearing a train, proceeded to cross the railroad track, when they were overtaken and run into by an approaching train. The train causing the injury was a westbound passenger train, which reached Ritzville on that day at about twelve o'clock M., some two hours behind its schedule time. After making its usual stop, it proceeded on its way, running, in so far as the record shows, at its usual rate of speed and in its usual manner.

The record shows further that, from the road crossing at the place of the accident, to Ritzville, the country is comparatively level, there being no natural obstruction that would prevent a person sitting in a buggy at the crossing from seeing a train approaching for the entire distance. The reason why the train was not observed approaching, by the victims of the accident when they stopped, looked, and listened before venturing to cross the railway track on the day of the accident, was because of the condition of the weather. Mrs. Holland testified, and in this she is supported by her witnesses, that the wind was blowing a gale when she and her companion left the town of Ritzville, and that it continued so to blow during the time they were approaching the railroad crossing; that great clouds of dust had been raised by the wind, preventing them from seeing any considerable distance at any time, and sometimes preventing them from seeing the horse which they were driving. Describing the conditions when they reached the crossing, the witness said: "The dust was rolling up; just coming in clouds like a fog, ... you couldn't see or hear, ... it was just thick, you couldn't see in front of you, the wind was so strong and the dust;" and later on she says that the wind was blowing in the

direction of the approaching train. After stopping in front of the track for a moment, and not seeing or hearing the approaching train, the appellant's companion, who was driving, remarked that she "guessed it was all right," and they started over. The horse had just reached the other side when the train struck the buggy.

The appellants' counsel concede that the conditions which prevented the appellant and her companion from seeing the train prevented the persons in charge of the operation of the train from seeing the horse and buggy, and negligence is not predicated upon any failure of either of the respondents to discover the appellant and stop the train before striking her. The charge of negligence is a failure to give warning of the approach of the train by ringing the engine bell and blowing the whistle. It is assumed that failure on the part of the respondents' servants to do these things on the approach of the train to this crossing was negligence, and that the appellant's injuries were the result of such failure. The evidence on the question of the fact involved is extremely meager. It consists of the statement of the appellant that she did not hear the bell or whistle when she stopped and listened just previous to crossing the track, and the statement of a witness, who was more than half a mile away from the train when it reached the whistling post, riding in a hack drawn by two horses, going in a direction opposite to that of the train, and paying no heed to the whistle, that he did not hear it.

It has seemed to us that the court was right in concluding that no evidence of negligence on the part of the respondent was shown. The evidence of the witness who was in the remote distance can scarcely be said to rise to the dignity of evidence. The statements of a person who testifies that he did not hear a bell ring or a whistle blow, where he is a mere passer-by without object or purpose in ascertaining the fact, is never satisfactory evidence, even under favorable circumstances, and it is entirely too much to say that the statement of this witness that he did not hear the whistle, under the cir-

cumstances shown, is proof of the fact that it was not blown.

It seems to us, also, that the fact is no better established by the evidence of Mrs. Holland. True, she was intent on ascertaining the approach of the train, and actually listened for it; but her own evidence makes it doubtful, to say the least, whether she could have heard the whistle had it been blown at the usual whistling place, and to blow it at any less distance would hardly have enabled her and her companion to have gotten out of the way. It must be remembered that the wind was blowing a gale in the direction of the train; that the dust was flying in dense clouds, and that the general situation was such as to prevent her from hearing. Any finding of the jury, therefore, that the whistle was not blown or the bell rung at the usual whistling place, based upon these statements, could hardly be said to be founded upon substantial evidence. It must be remembered that negligence is not presumed; that it must be shown by direct evidence, or by evidence of facts and circumstances from which its existence may reasonably be inferred. The presumption, if any may be indulged in, is that all parties acted with ordinary care, and this presumption continues until overthrown by evidence. *Swift & Co. v. Holoubek*, 60 Neb. 784, 84 N. W. 249.

In discussing the question at issue, we have assumed that it would have been negligence on the part of the railroad company not to have blown the whistle or rung the bell on the approach of the train to this crossing. We do not wish to be understood, however, as asserting it to be a general principle of law, that negligence will be inferred from the fact that the whistle was not blown or the bell rung on the approach of a train to a road crossing. It is manifest that such is not the rule, but that the question must depend on the circumstances of the particular case.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8055. Department One. October 11, 1909.]

SHAW & HODGINS, *Respondents*, v. C. W. WALDRON, *Appellant*.[1]

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—REASSESSMENTS—LIMITATION OF ACTIONS. An action by a holder of a warrant against a special improvement fund to compel a reassessment cannot be maintained when the landowner could plead the statute of limitations against the reassessment.

SAME—PRESUMPTIONS. Where the record does not show the exact date when an assessment became delinquent, it will be presumed that an action to compel a reassessment was commenced within the period limited by the statute of limitations, when the defense of the statute was not interposed and a reassessment was ordered.

SAME — SUSPENSION OF STATUTE — JUDGMENTS — RES JUDICATA—PARTIES BOUND. An action begun by a holder of a warrant against a special fund to compel a reassessment, he having no other remedy, in which the city defends for the benefit of the landowners, arrests the running of the statute of limitations against the right to levy a reassessment, and is equivalent in law to a valid assessment, and is binding on the landowners.

MUNICIPAL CORPORATIONS — CONTRACTS—OFFICER INTERESTED—EFFECT—SPECIAL ASSESSMENTS—DEFENSES. The purchase of supplies by a contractor for city work, from the mayor, only avoids his contract with the city *pro tanto*, under Bal. Code, § 968, providing that any claim for supplies furnished, "in which any such officer is interested," shall be void and that the officer shall forfeit his office; and does not bar an action by the contractor as holder of a warrant against a special fund to compel a reassessment to provide the fund.

FULLERTON, J., dissents.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered March 20, 1909, in favor of the plaintiffs upon stipulated facts, after a trial before the court without a jury, in an action to restrain a city in the collection of an assessment and from paying warrants issued in payment of a local improvement. Reversed.

[1]Reported in 104 Pac. 272.

Kerr & McCord, Frank D. Nash, and *Merrick & Mills,* for appellant.

Brownell & Coleman and *Robert McMurchie,* for respondents.

CHADWICK, J.—In the year 1890, the city of Snohomish adopted ordinances creating improvement districts, made improvements, and issued warrants to cover the cost. In 1891 a special assessment was made upon the lands abutting on the streets which had been improved. In 1894 this assessment was adjudged by the court to be void; whereupon the city made another assessment which was also declared to be void. Thereafter, and from time to time, appellant Waldron, who was the holder of most of the warrants, urged and demanded of the city council that they make a reassessment upon the property benefited. This might have been done under the act of 1895, p. 142, chap. 79, but no action was ever taken by the city authorities.

In 1901 Waldron instituted a proceeding in the superior court for Snohomish county, against the mayor and councilmen of the city of Snohomish, to compel a reassessment. This proceeding was defended by the city and, being brought on for trial in 1902, was taken under advisement by the court, who so held it until the 7th day of January, 1905, when he issued a writ of mandate compelling the city to proceed with the assessment as prayed for in the petition. Upon appeal (*Waldron v. Snohomish,* 41 Wash. 566, 83 Pac. 1106), this judgment was affirmed, and a reassessment was thereafter made by the city. After due notice given, this assessment was confirmed by the council early in the year 1907. Thereafter respondents and several others brought actions to restrain the city from proceeding further, or in any manner undertaking to collect any part of the assessments, and from paying any of the warrants held by appellant Waldron. A demurrer to the complaint being overruled, defendants answered, defendant Waldron setting up as an affirmative de-

fense the matters to which we have briefly referred, and to all of which a demurrer was sustained. Certain facts were stipulated, after which the court rendered judgment in favor of the plaintiffs, and defendant Waldron has appealed.

There seem to be two grounds upon which respondents rest their case: (1) that the right to levy and collect this special assessment is barred by the statute of limitations; (2) that the original contract is void in that the then mayor of the city did, in violation of the statute (Bal. Code, § 968; P. C. § 3510), contract with and furnish the original contractors with materials and supplies to be used in the prosecution of the work. The record indicates that the first is the only ground considered by the trial court.

This court has held that special assessments are not charges against the general funds of the city. *State ex rel. American etc. Mtg. Co. v. Tanner*, 45 Wash. 348, 88 Pac. 321; where the authorities are collected and discussed; and, also, *Dean v. Walla Walla*, 48 Wash. 75, 92 Pac. 895; *Soule v. Ocosta*, 49 Wash. 518, 95 Pac. 1083; *Jurey v. Seattle*, 50 Wash. 272, 97 Pac. 107. Therefore, if the landowner can plead the statute, this action cannot be maintained under the authority of *Frye v. Mount Vernon*, 42 Wash. 268, 84 Pac. 864, and *Olympia v. Knox*, 49 Wash. 537, 95 Pac. 1090. The exact date upon which the original assessment became delinquent is not made certain in the record, but it is admitted that it was in the year 1891; and, inasmuch as the defense of the statute was not set up in the case of *Waldron v. Snohomish*, we must assume that appellant Waldron instituted that action within the ten-year period of limitations, as provided in the act of 1895. At any rate, under the decision of this court rendered in that case, a peremptory writ issued to compel the reassessment which respondents now seek to defeat.

The remaining question then is, Was the statute of limitations arrested while appellant Waldron pursued his remedy

against the city? It must be borne in mind that Waldron had no remedy against the property owners, and the city no direct interest in the result of the litigation. Waldron brought his action against the only party chargeable in the first instance; he pursued the only remedy he had, and the defense made by the city was for the benefit of the property owners. Had the city won, they would have had the benefit of the improvement with the property discharged of all liens; it lost, and they are bound by the judgment and precluded from asserting any defense that might have been made in the principal action. An action begun within the period of limitation to compel an assessment is equivalent in law to a valid assessment.

In the cases relied on by respondents, no legal assessment was made within ten years after the work was done or the assessment became delinquent on the first attempted levy. In *Frye v. Mount Vernon*, the court said:

"It will thus appear that on December 22, 1904, when respondent, as relator herein, filed his original affidavit asking a writ of mandamus, a period of over thirteen years had expired since the original assessment now claimed to be invalid had become delinquent; . . . No question can arise but that a period of more than ten years has expired not only since the original pretended assessment became delinquent, but also since, as claimed by respondent, it was adjudged to be void. . . . Assume that the town council of Mount Vernon should, of its own motion, make a reassessment to pay these warrants, the original assessment having been delinquent for more than ten years, would it be contended that the owners of property assessed could not plead the statute of limitations when the municipality endeavored to enforce its lien? To say they could not plead the statute would be to hold that the council could delay making a reassessment for any indefinite period of time, and yet hold that whenever any council at a later date might perchance be seized with an inclination or desire to reassess, they could and would be permitted to do so, without regard to lapse of time. We do not think this could be permitted. But if, after the lapse of ten years, the council could not make a

valid reassessment of its own motion, it will not be required to do so by a peremptory writ of mandate."

The necessary implication from this language is that, if the action had been instituted by Frye within the ten-year period of limitation, the decision in that case would have been different, and the city would have been compelled to levy an assessment to pay the improvement warrants. The logical sequence of this reasoning is that, if it be lawful to compel the city to levy an assessment, the courts will not restrain the collection of the tax. The remedy to which the court has said appellant is entitled is not so much the levy of the assessment as its collection; and the rights and liabilities of all parties, including the property owner, who was in law the party charged in the mandamus proceeding, although prosecuted against the city, related back to and are fixed as of the time the action was begun. The mandamus proceeding having been begun within the period of limitation, the property owner must be held to be bound by the acts and defenses made by the city council. Otherwise appellant would be without remedy. We concede the rule to be otherwise where the warrant holder allows the full limit of the statute to run before beginning an action to compel a valid assessment. Upon this principle this case is to be distinguished from the late case of *State ex rel. Seymour v. Slater*, 53 Wash. 608, 102 Pac. 651.

The following facts were stipulated and, although probably not passed upon by the trial judge, are before us for legal construction:

"It is stipulated that the books of Blackman Bros. show that between October 31, 1890, and December 31, 1890, Joseph Plaskett, the contractor, purchased from Blackman Bros. three bills of lumber aggregating two thousand eighty-eight dollars and ninety cents ($2,088.90), and that said books show that from January 8th to June 12th, 1891, Blackman Bros. credited Plaskett's accounts with the sum of eighteen hundred and fifty-two ($1,852.00) dollars which Mr. Blackman states was paid out by Plaskett to the men

employed in his mill on their wage account upon the order of Blackman Bros., and that Mr. Blackman will also testify that this lumber was sold by his firm in the ordinary course of business. It is stipulated that the contractor, Mr. Plaskett, purchased lumber from other mills for said contract to the extent of at least ten thousand dollars ($10,000.00) and that, in purchasing the lumber from Blackman Bros., he acted in good faith, in the ordinary course of his business. It is admitted that Mr. Plaskett will testify that he purchased this timber in the ordinary course of his business, and that he had no agreement with Blackman Bros. or the mayor as a member of the firm of Blackman Bros., for a share of any of the profits that might inure to him in the prosecution of his contract with the city for these improvements; and that both Mr. Blackman and Mr. Plaskett will testify that the contract for the sale of the lumber above referred to was entered into subsequent to the time the contract for the improvement herein referred to had been let to Mr. Plaskett by the city of Snohomish, and that there was no understanding of any character whatsoever, had at or prior to the time said contract was let, that the firm of Blackman Bros. were to furnish any part of the lumber to be used in connection therewith. 'That the said H. Blackman was at all of said times a member of a firm known as Blackman Brothers, and owned a large and substantial interest in the business of said firm. That the said firm entered into a contract with the said J. H. Plaskett, the contractor for said work, whereby the said Blackman Brothers agreed to furnish all the lumber required for the planking of said street and the construction of the sidewalks on each side thereof, and agreed to accept in payment for said lumber warrants thereafter to be issued by the said defendant, City of Snohomish, to the said contractor for said work. That large quantities of lumber were used in planking said streets and constructing sidewalks and curbing thereon. That the said Blackman Brothers furnished all the lumber therefor, pursuant to said agreement and received from said contractor in payment therefor warrants issued by said city to said contractor for said work.' "

The record shows that H. Blackman was the mayor of Snohomish at that time. The case of *Northport v. Northport Townsite Co.*, 27 Wash. 543, 68 Pac. 204, is relied on

by respondents to defeat a recovery. The concrete question presented is, whether the whole claim of an independent contractor can be avoided because in the execution of his contract he has bought necessary supplies or materials from a member of the city council or the mayor. Although the construction put upon the *Northport* case by respondents may seem warranted, yet we cannot think that it was ever the intention of the court to hold that a dealing on the part of the contractor with the city officer would do more than avoid a contract *pro tanto*. Bal. Code, § 968 (P. C. § 3510), among other things provides:

". . . and any claim for compensation for work done, or supplies or materials furnished, in which any such officer is interested, shall be void, and if audited and allowed, shall not be paid by the treasurer."

It also provides for removal from office and for punishment in case of wilful violation. The statute is aimed at the officer, and intended to prevent a recovery on his part or to the extent of his interest when the claim is asserted by another. This object is attained when the amount of his interest is determined and rejected. Out of the whole amount due on the original contract, the value of the material furnished, and in which the mayor had an interest, was inconsiderable. The record shows that an appeal is pending from the order of assessment. The correctness of the amount of the assessment is made a proper subject for the determination of the superior court upon such appeal, and we doubt not that the court will reject the warrants so unlawfully issued, as well as consider other irregularities, and give judgment accordingly.

This cause will be reversed, and remanded for further proceedings in accordance with this opinion.

RUDKIN, C. J., MORRIS, and GOSE, JJ., concur.

FULLERTON, J. (dissenting)—I am unable to distinguish this case from that of *State ex rel. Seymour v. Slater*, cited

in the majority opinion, and on the authority of that case, I think this one should be affirmed.

[No. 7324. Department Two. October 14, 1909.]

A. F. BICKFORD *et al.*, *Plaintiffs*, v. ERWIN W. STEWART *et al.*, *Defendants*.[1]

ABSENTEES — AGENT OF ABSENTEES — APPOINTMENT — AUTHORITY. Where, upon the partition of an estate, an agent for absentees was appointed in probate to receive and care for their portion of the estate, distributed to them, and later by a suit in equity, the distribution was set aside and a different tract of land distributed to the absentees in lieu of the first, the agent still retains authority to act under the appointment in probate as to the later parcel finally awarded.

SAME—SALE BY AGENT—PETITION. Where an agent for absentees was appointed in probate, under Bal. Code, § 6371, to receive their portion of the inherited estate distributed to them, and the appointment was later continued in a suit in equity instituted for a redistribution, a sale by the agent under order of court pursuant to § 6373, is not affected by the fact that the petition for sale was filed in the equity case; since that court had then acquired and exercised probate jurisdiction over the estate.

SAME—POWER TO SELL—CONSTITUTIONAL LAW—TAKING PROPERTY WITHOUT DUE PROCESS OF LAW. The act, Bal. Code, §§ 6371-6375, authorizing the appointment in probate of an agent for absentees to receive their portion of the estate, and if not claimed within one year, to sell the same under an order of court, paying the proceeds, less expenses, into the county treasury, for the use of the absentees, is within the inherent legislative power of the state to control the inheritance and descent of property, and does not violate the constitutional inhibition against the taking or sale of property without due process of law.

DESCENT AND DISTRIBUTION—RIGHTS OF HEIRS—TITLE. Property only descends to and vests in the heirs subject to administration, and may be divested by the process of administration.

ABSENTEES—APPOINTMENT OF AGENT—SALES—METHOD OF SALE—STATUTES. The act, Bal. Code, §§ 6371-6375, authorizing the appointment in probate of an agent for absentees to recover their portion of the estate, and to sell the same if not claimed within a year, is

[1]Reported in 104 Pac. 263.

not ineffective as to the sale by reason of failing to provide a method of sale, where it provides for sale by the agent "under order of court" and all the procedure required for administrator's sales was followed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., dissent.

Cross-appeals from a judgment of the superior court for King county, Albertson, J., entered March 27, 1908, upon findings awarding plaintiffs reimbursements for improvements, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed on plaintiffs' appeal.

Kerr & McCord, for plaintiffs.

Sullivan & Stevens and *H. H. Eaton*, for defendants.

MOUNT, J.—The plaintiffs brought this action in the lower court to quiet title to certain real estate against the claims of the defendants. Upon the trial of the case, the court found that title to the property was in the defendants, but that plaintiffs were or should be reimbursed for certain improvements placed thereon, and entered a decree accordingly. Both parties have appealed. They will, therefore, be designated in this opinion as plaintiffs and defendants.

Under the view we take of the case, it will not be necessary to pass upon several questions argued in the briefs. It seems that Martin V. Stewart died intestate in King county on May 29, 1895. He left no wife or children or father or mother. Several brothers and sisters, or the descendants of such brothers and sisters, survived him. At the time of his death, he was seized of certain real estate in King county, a part of which is the property in question in this case. The defendants Erwin W. Stewart and Lizzie Stewart are the only children of Erwin M. Stewart, a brother of said Martin V. Stewart. The said Erwin M. Stewart died intestate about a year before the death of his brother Martin V. Stewart. The legislature of the state of California passed an act in the year 1866, when the children Erwin Webster Stewart and

Sarah E. Stewart were about ten years of age, which act changed the names of these children to Webster Smith and Sarah E. Smith. The latter was afterwards married, and is known in the title of the case as Sarah E. Martin. The defendant Webster Smith is the same person as Erwin W. Stewart, and Sarah E. Martin is known in the record as Lizzie Stewart. They will be hereinafter referred to as defendants.

After the death of Martin V. Stewart, his estate was regularly administered upon by the probate court of King county, and the estate was distributed to nine brothers and sisters and their issue, among whom were the defendants in this case. Before the distribution by the probate court, a petition was filed therein for a partition of the estate. When this petition came on to be heard, it was made to appear to the probate court, that the defendants in this case were nonresidents of the state; that their address and residence were unknown, and that they had no agent in this state, and that it was necessary for some person to take charge of their interests in the estate and care for the same. The probate court thereupon appointed one Fred Rice Rowell as agent for that purpose, under Bal. Code, § 6371 (P. C. § 2695), and he duly qualified as such. Thereupon a commission was appointed, and the estate was partitioned by a decree dated October 25, 1898, in probate. A certain definite share of the estate was awarded to each of the brothers and sisters of Martin V. Stewart, or their issue. The defendants were awarded a portion known as tract 4 of the Stewart estate. Possession of this tract was taken by Mr. Rowell, as agent appointed as above stated.

Thereafter, in September, 1899, one Ann M. Arnold, a surviving sister of Martin V. Stewart, deceased, and who had been omitted from the distribution of the estate of her deceased brother, brought a suit in the superior court of King county against all of the distributees of the estate by the probate decree. She alleged in her complaint that she was a

sister, and entitled to share in the estate. Service in that case was made upon all the parties, and upon these defendants by publication. Personal service was made upon their agent appointed as above stated. Thereafter, in January, 1901, a decree was entered in that case, which set aside the distribution of the estate by the probate court and made a new distribution of the estate. The part set over to these defendants was lot 9 of the Stewart estate. This lot was a smaller and a different tract of land from the one awarded in probate. This decree did not disturb the appointment of Mr. Rowell as agent of these defendants, but continued him as such.

In June, 1902, Mr. Rowell, as agent for these defendants, filed a petition in the superior court of King county, stating that he was in possession of property, viz., lot 9, of the Stewart estate, and had been since his appointment as agent; that Erwin W. Stewart and Lizzie Stewart were nonresidents; that he had been unable to find where they were, or to communicate with them; that he had made diligent inquiry to learn where they were, but without success; that the property was nonproductive, and that taxes and special assessments were due and coming due; that there were no funds to pay the same; that he had held the property for more than one year and no claim had been made therefor, and prayed for an order to sell the property. A notice was published to all interested persons to show cause at a fixed time why the order should not be made as prayed for. An order afterwards was made, and in pursuance thereof the agent, after notice, sold the property to Hester E. Finley and made return thereof, and the sale was confirmed on September 23, 1902. The purchaser entered into possession of the property under the agent's deed, and in January, 1904, sold the property to the appellants, who went into possession and improved the same.

Upon these facts the trial court was of the opinion that the sale by Mr. Rowell, as agent of these defendants, was

void, and did not divest them of the title to the lot in question. There is nothing in the record to indicate upon what ground the court concluded that the sale was void. Counsel for defendants, in their brief, contend that the proceedings were irregular because the lot sold was not the one for which the agent was appointed in the probate proceedings, and also that the statute under which the agent was appointed is unconstitutional for the reason that it authorized one's property to be taken and sold without notice and, therefore, without due process of law.

It is true that the lot finally awarded to the defendants was not the one awarded to them in the probate proceedings. The one awarded in the probate proceedings was erroneously awarded, because it was more than the share to which defendants were entitled. The subsequent suit in equity was for the purpose of correcting that mistake. The property finally awarded by the court in equity was the property which should have been awarded in the probate proceedings. Defendants' title came to them by inheritance or by operation of law, and was, therefore, not affected by the manner of the decree or the name or nature of the court which finally made the distribution. The agent was appointed in the probate proceedings before any definite tract of land was distributed to the heirs. He was appointed to represent these absentees, and to care for their interests in the partition of the estate, and to receive the portion awarded to them. The right of the agent to act under the appointment in probate was not affected by the parcel of land which was awarded to the defendants. It was his duty to receive whatever land came to the defendants from that estate. There seems to be no other irregularity in the proceedings, and we are therefore of the opinion that there is no merit in the contention that the lot was not the one over which the agent was appointed.

The statutes of this state provide for the partition and distribution of estates of deceased persons as follows:

"Bal. Code, § 6371 (P. C. § 2695). When any estate shall have been assigned by decree of the court, or distributed by

commissioners, as provided in this chapter, to any person residing out of this state, and having no agent therein, and it shall be necessary that some person should be authorized to take possession and charge of the same for the benefit of such absent person, the court may appoint an agent for that purpose, and authorize him to take charge of such estate, as well as to act for such absentee in the partition and distribution."

"Sec. 6372 (P. C. § 2696). Such agent shall give a bond to the state of Washington, to be approved by the court, conditioned faithfully to manage and account for such estate, before he shall be authorized to receive the same, and the court appointing such agent may allow a reasonable sum out of the profits of the estate for his services and expenses."

"Sec. 6373 (P. C. § 2697). When the estate shall have remained in the hands of the agent unclaimed for one year, it shall be sold under order of the court, and the proceeds, deducting the expenses of the sale, to be allowed by the court, shall be paid into the county treasury. When the payment is made the agent shall take triplicate receipts, one of which he shall file with the county auditor, and another with the court."

"Sec. 6374 (P. C. § 2698). The agent shall be liable on his bond for the care and preservation of the estate while in his hands, and for the payment of the proceeds of sale as required by the preceding section, and may be sued thereon by any person interested."

"Sec. 6375 (P. C. § 2699). When any person shall appear and claim the money paid into the treasury, the court making the distribution, being first satisfied of his right, shall order the payment of such money, and, upon the presentation of a certified copy of the order to the county auditor, he shall draw his warrant on the county treasurer for the amount."

If we understand the position of defendants, it is that these statutes do not authorize a court of equity to appoint an agent with authority to sell the property of another, and that if the statutes authorize one person to sell another's property without notice, such statutes are in violation of the constitution which provides that property shall not be taken without due process of law. As we have seen above, the appointment of the agent of these defendants, who were absentees from the state, was made in the course of administration upon the

estate. It was made, in fact, by the probate court having jurisdiction over the estate. The appointment was continued by an order of an equity court, but that continuation added nothing to the right of the agent to act under the original appointment which was not set aside. The fact that the petition for the sale of the lot in question was made to the superior court wherein the equity case was tried, and was filed in that case, makes no difference, because that court then had and exercised probate jurisdiction over the estate. Section 6371 by its terms clearly authorized the court having jurisdiction in such matters to appoint an agent for nonresidents, to take charge of the inherited estate of such absentees, and to act for them in the partition and distribution of the estate. The statute was intended for their benefit and protection.

It is said that these statutes violate the fourteenth amendment of the constitution of the United States, for the reason that the statutes authorize property to be sold without due process of law. The interest of the defendants in the property in question was acquired by inheritance. Their right thereto depends upon the statute. The state may, and does, control the disposition of the estates of deceased persons leaving property therein. The legislature may declare who shall be the beneficiary and the manner in which the estate shall descend. This power of the state is elementary. There is no constitutional restriction thereon in this state. It follows, therefore, that the legislature had authority to provide the method by which resident, as well as absent heirs, should take an inheritance, and to that end provide for the care and protection of property of absent heirs, acquired by inheritance. *Cunnius v. Rearing School Dist.*, 198 U. S. 458, 25 Sup. Ct. 721. The probate court, or the court administering the estate, acquired complete jurisdiction of the property, and was no doubt authorized to appoint an administrator with authority to care for and sell the estate in the manner provided by law. The probate law authorizes the appointment of an administrator.

The sections quoted above authorize the appointment of an agent to look after the share awarded to the absent heirs. The theory of the appointment of the agent was for the benefit of such absentees. The authority to enact the statute and to appoint such agent is based upon the same reasoning, and is derived from the same source, as the authority to appoint an administrator of the estate, viz., the inherent power of the state to control the estates of deceased persons. We think there can be no doubt, therefore, of the power of the state to enact such statutes. They do not fall within the provision of the state or Federal constitution, declaring that property shall not be taken without due process of law, because the proceedings by which an heir acquires an inheritance cannot be said to be a taking of his property, although it may be sold by such proceedings against his will. Such sale is a part of the proceedings of administration. The statute in question authorizes the sale of property of an absentee when certain conditions are made to appear. The authority of the agent in regard to an absentee is the same, and he acts in the same capacity in regard to the property of such absentee, as an administrator of the estate. He is agent of the state as well as of the heirs, for the purpose of administering upon the estate, and the property of the absentee may be sold when the statutory conditions therefor are shown to exist, by the same authority and for the same reason as a sale may be made in administering an estate. The absentee in such case would be entitled to the notice provided by statute, and to no more. It cannot be argued that an administrator of an estate may not sell the property of an estate, for the purposes and in the manner provided by statute, without the consent of the heirs. Such sale is not taking property from the heirs without due process of law. The same rule must necessarily apply in the case of absent heirs.

Counsel for defendants contend that the question in this case is, Can the property of A be sold by B without authority from A? We think counsel misapprehend the real question.

While the legal title may vest in the heirs immediately upon the death of the ancestor, it vests subject to administration (Bal. Code, § 4640; P. C. § 2718), and is not absolute until after the process of administration. So that the title may be divested by the process of administration. The nonresident and absent heirs might have claimed the estate within the time and thus obtained an absolute title which could not be divested except by notice, but until that was done, the agent was clearly authorized to sell the estate for the protection of the heirs who are absentees, without actual notice to them, and without their consent, in the manner provided by statute.

It is also contended that the statutes do not provide a method of sale, and are therefore without force. But it is provided therein that the property "shall be sold under order of the court," and it appears that it was so sold in this case. All the procedure required for sales in probate were followed, and the proceedings appear to have been regular. We are of the opinion that the constitutional objections urged against the statute are not tenable; that the sale by the agent was a valid one, and divested the defendants of their title.

The judgment must therefore be reversed, and the cause remanded with directions to the lower court to grant the prayer of the complaint.

CROW, PARKER, and DUNBAR, JJ., concur.

RUDKIN, C. J. (dissenting)—I agree with the majority that the right to inherit property is derived from the municipal law, and that the authority conferring the right may attach to its exercise and enjoyment such conditions as it deems proper. But a state may not prescribe one rule of descent for its own citizens and another and different rule for citizens of other states. Section 2 of art. 4 of the constitution of the United States declares that:

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Section 1 of art. 14, of the amendments to the constitution of the United States declares that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Sections 1977 and 1978 of the Revised Statutes of the United States provide as follows:

"Sec. 1977. All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

"Sec. 1978. All citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

It seems to me that Bal. Code, § 6373 (P. C. § 2697), denies to the appellants, who are citizens of California, privileges and immunities which are enjoyed by the citizens of this state. In other words, property acquired by inheritance by a citizen of the former state may be sold in an *ex parte* proceeding if not claimed within a year after distribution, while no such penalty is visited upon the citizen of this state who fails to claim his inheritance within the like period. The citizens of California have an equal right to inherit property in this state with our own citizens; they are entitled to the same remedies for the enforcement of their rights, and it seems to me that the remedy at least is denied them by the statute in question.

But if I am in error on the constitutional question, I still think the judgment should be affirmed. The state statute under consideration is in derogation of common right to be

strictly construed, and when the decree of probate was set aside in the subsequent equitable action, and other and different property awarded to the appellants, I am of opinion that the authority of the statutory agent ceased, and that the sale thereafter made was null and void. The statute only authorizes the appointment of an agent where it is necessary that some person should be appointed to take charge of the estate for the benefit of the absent person, and the question of necessity must perforce depend upon the kind or character of the estate distributed. The appointment of the agent may have been necessary and proper for the estate originally distributed to the appellants, but wholly unnecessary for the estate awarded by the second decree. A court of equity has no power to appoint an agent for property, or to continue an agency created by some other court, and a court of probate has no power to appoint an agent to take charge of property decreed to a person, resident or nonresident, by another tribunal.

For the reasons thus briefly stated, I dissent.

ON REHEARING.

[*En Banc.* Decided February 17, 1910.]

PER CURIAM.—A rehearing was granted in this case, and a reargument was heard by all the judges sitting *en banc*.

We adhere to the rules stated and the conclusion reached in the majority opinion.

RUDKIN, C. J. (dissenting)—I adhere to the views expressed in the dissenting opinion heretofore filed.

CHADWICK and FULLERTON, JJ., concur with RUDKIN, C. J.

GOSE, J. (dissenting)—I concur upon the first reason assigned in the dissent opinion heretofore filed.

[No. 8183. *En Banc.* October 16, 1909.]

A. D. McKNIGHT, *Petitioner*, v. ROBERT T. HODGE, *as Sheriff of King County, Respondent.*[1]

CONSTITUTIONAL LAW — PRIVILEGES OF CITIZENS — PEDDLERS—DISCRIMINATION BETWEEN CLASSES. Laws 1909, p. 736, requiring a county license from peddlers, except peddlers of agricultural and farm products, and books, periodicals and newspapers, does not arbitrarily discriminate between persons in substantially the same situation, but the classification is reasonable and germane to the object and purposes of the legislation and therefore constitutional.

SAME — DISCRIMINATION BETWEEN LOCALITIES — DELEGATION OF POWER. Laws 1909, p. 736, requiring a county license from all peddlers except in cities and towns when their licensing is regulated by such cities or towns, is not an unconstitutional discrimination between classes, since the legislature may delegate, as a revenue measure, the power on the subject to cities and towns, and it is not necessary that the police power be exercised by uniform regulations throughout the state.

SAME—DISCRIMINATION BETWEEN CLASSES. LAWS 1909, p. 736, requiring a license fee of $100 from peddlers on foot, $150 and $250 from peddlers with one and two horses, and $300 from peddlers with other conveyances, is not unconstitutional as exacting unequal fees, as the classification is a proper basis for measuring the license fee.

STATUTES — PROVISOS — REPUGNANCY—HAWKERS AND PEDDLERS—LICENSE. The proviso to Laws 1909, p. 737, § 3, that county peddlers' licenses shall expire by limitation on the second Monday in January succeeding the year in which they were issued, is wholly inconsistent with and repugnant to the body of the act requiring the issuance of an annual license authorizing the licensee to do business for the term of one year from the date thereof, and is therefore inoperative and void.

HAWKERS AND PEDDLERS—LICENSE FEE—REASONABLENESS. An annual county license fee of $100 from peddlers on foot, $150 and $250 from peddlers with one and two horses, and $300 from peddlers with other conveyances, is not excessive, where regarded as an exercise of both the police and taxing power.

Application filed in the supreme court July 12, 1909, for a writ of habeas corpus to secure the release of a person held upon a charge of peddling without a license. Writ denied.

[1]Reported in 104 Pac. 504.

Chas. D. Fullen, for petitioner.

George F. Vanderveer and *Merritt, Oswald & Merritt*, for respondent.

PARKER, J.—This is an application for a writ of habeas corpus. The questions involved have been presented to the court by oral argument and briefs of counsel, upon an order to show cause why the writ should not issue. The petitioner is held in custody by the sheriff of King county, upon a charge of peddling without having a license therefor, in violation of the provisions of Laws of 1909, pp. 736-738, ch. 214. The only ground of illegality urged against the detention of the petitioner is, that the law under which he is charged is in violation of his rights under the state and Federal constitutions. The provisions of the law, so far as involved by the questions presented, are as follows:

"Section 1. The term peddler for the purpose of this act shall be construed to include all persons, both principals and agents, who go from place to place and house to house, carrying for sale, or offering for sale or exposal for sale, goods, wares or merchandise: *Provided*, That nothing in this act shall apply to peddlers in agricultural or farm products: *And provided further*, That nothing in this act shall apply to peddlers within the limits of any city or town which by city ordinance regulates the sale of goods, wares or merchandise by peddlers: *And provided further*, That nothing in this act shall apply to vendors of books, periodicals or newspapers."

Section 2 provides for punishments.

"Sec. 3. Every peddler, whether principal or agent, shall, before commencing business in any county of the state, make application in writing and under oath to the county treasurer for the county in which he proposes to make sales, for a county license. Such application must state the names and residences of the owners or parties in whose interest said business is conducted, and shall state the number of horses and vehicles to be used by him, and at the same time shall file a true statement under oath of the quantity and value of the stock of goods, wares and merchandise that is in the county

for sale or to be kept or exposed for sale in said county, and shall at the same time make special deposit of five hundred dollars with the county treasurer aforesaid, and shall pay the said treasurer the county license fee as follows:

(1) Peddler on foot, $100.00.
(2) Peddler with one horse and a wagon, $150.00.
(3) Peddler with two horses and a wagon, $250.00.
(4) Peddler with any other conveyance, $300.00.

The county treasurer shall thereupon issue to said applicant a peddler's license, authorizing him to do business in the county aforesaid for the term of one year from the date thereof: *Provided*, That the license issued under and by virtue of this act shall expire by limitation on the second Monday of January succeeding the year of which said license was issued. Every county license shall contain a copy of the application therefor and shall not be transferable, and shall not authorize more than one person to sell goods as a peddler, either by agent or clerk, or in any other way than his own proper person."

Section 4 provides for records and files of licenses.

"Sec. 5. Upon the expiration and return of each county license, the county treasurer shall cancel the same, endorse thereon the cancellation thereof and place the same on file. He shall then hold the special deposit of the licensee thereunder for a period of ninety days from the date of said cancellation, and after satisfying any and all claims made upon the same in the section next following shall return said deposit or such portion of the same, if any, as may remain in his hands, to the licensee.

"Sec. 6. Each deposit made with the county treasurer of any county in this state shall be subject to all taxes legally chargeable to same, to attachment and execution on behalf of the creditors of the licensee whose claims arise in connection with the business done under his county license, and the treasurer may be held to answer as trustee in any civil action in contract or tort brought against any licensee, and shall pay over, under order of the court or upon execution, such amount of money as the licensee may be chargeable with upon the final determination of the case. Such deposit shall also be subject to the payment of any and all fines and penalties incurred by the licensee through violations of the provisions of the pre-

ceding sections, and which shall be a lien upon same and shall be collected in the manner provided by law."

Learned counsel for the petitioner contends that this law is repugnant to § 12 of article I of our state constitution, which provides:

"No law shall be passed granting to any citizen or class of citizens . . . privileges or immunities which, upon the same terms shall not equally belong to all citizens;"

and is also repugnant to the fourteenth amendment of the constitution of the United States, which, in substance, secures the same equal rights. It is argued that, since privileges and immunities are by the terms of this law granted to peddlers of agricultural products, books, periodicals and newspapers, which are withheld from peddlers of other articles, by exacting a license fee from the latter and not from the former, such privileges and immunities are, therefore, not accorded to all upon the same terms. This argument is based upon the assumption that all peddlers are necessarily in the same class, and that the legislature has no power to recognize subclasses within the general class, but must grant privileges or immunities to or withhold them from all peddlers alike.

It may be conceded that the discrimination between the classes must rest upon some reasonable ground of difference, and that such difference must have some relation to the business, and not be a mere difference in the persons placed in the respective classes or subclasses, which is entirely foreign to the business, such as a difference in citizenship. (*Bacon v. Locke*, 42 Wash. 215, 83 Pac. 721; *State v. Montgomery*, 94 Me. 192, 47 Atl. 165, 80 Am. St. 386; *Simrall v. City of Covington*, 90 Ky. 444, 14 S. W. 369, 29 Am. St. 398, 9 L. R. A. 556); or a difference by reason of previous military service. *City of Laurens v. Anderson*, 75 S. C. 62, 55 S. E. 136, 117 Am. St. 885; *State v. Garbroski*, 111 Iowa 496, 82 N. W. 959, 82 Am. St. 524, 56 L. R. A. 570; *State v. Shedroi*, 75 Vt. 277, 54 Atl. 1081, 98 Am. St. 825, 63

L. R. A. 179. In all such cases it will be noticed the difference used as a basis for classification has no more relation to the business or proper purpose of the legislation than if it were a distinction based upon a difference in the color of hair or eyes of the persons sought to be put into the different classes.

In the case of *Lasher v. People*, 183 Ill. 226, 231, 55 N. E. 663, 75 Am. St. 103, 47 L. R. A. 802, where commission merchants dealing in certain farm products were required to be licensed, while those dealing in certain other farm products were exempt from the law, the court said:

"It is first argued that the statute is invalid as discriminating between commission merchants, because it excepts those who deal in grain, live stock, and dressed meats. The claim is that produce commission merchants constitute a class, and that the legislature must require a license from all or none. This objection to the law is not valid. The legislatures have power to form classes for the purpose of police regulation, if they do not arbitrarily discriminate between persons in substantially the same situation. The discrimination must rest upon some reasonable ground of difference, but the classification in this case is a natural one. The commission merchants dealing in the kinds of produce named in this act, which constitute the small products of the farm, are of a different class from those who transact business in the great markets for the sale of grain, live stock and dressed meats."

In the case of *State v. Evans*, 130 Wis. 381, 385, 110 N. W. 241, in answering the contention that a law requiring pharmacists to be licensed in towns of five hundred population or more, and not elsewhere in the state, was unconstitutional as class legislation, touching the power of the legislature to define the class upon which the law should operate, the court said:

"Doubtless this law, like all other police laws, presents classification, and we are confronted, as in the case of every such law, with the duty to consider the relationship of the distinctions between the classes to the subject of the legislation. Of course there must be such relationship. A mere arbitrary distinction in no wise relevant to the subject of legislation will not justify a departure from that equal pro-

tection of the laws commanded by the 14th amendment to the Federal constitution, nor that equality before the law commanded by section 1, art. 1, of the Wisconsin constitution. It is unnecessary, and probably futile, to attempt again to state those rules as to classification in legislation which have been phrased so often to the utmost of the ability of the judges writing the opinions. The citation of a few illustrative cases will suffice: *Adams v. Beloit*, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441; *State ex rel. Kellogg v. Currens*, 111 Wis. 431, 436, 87 N. W. 561, 56 L. R. A. 252; *Black v. State*, 113 Wis. 205, 219, 89 N. W. 522, 90 Am. St. Rep. 853; *State ex rel. Risch v. Trustees*, 121 Wis. 44, 54, 98 N. W. 954; *State v. Whitcomb*, 122 Wis. 110, 119, 99 N. W. 468; *Bingham v. Milwaukee Co.*, 127 Wis. 344, 106 N. W. 1071. That there are distinctions between large and dense communities and small and sparser ones as separate classes is, of course, obvious. That such differences are germane and relevant to some purposes of legislation has been declared, almost without limit, by courts. *Smith v. Burlington*, 109 N. W. (Wis.) 79, and cases there cited. But, as remarked in that case, each new exercise of the power of police regulation presents anew to the courts the question of possible relationship between the distinguishing characteristics of the classes and the object and purposes of the regulation. As to the cogency or propriety of either the regulations made, or of the importance of the distinctions, as we have so often said, the courts have little concern. Those subjects rest with the legislature, and only when the court, in the exercise of the utmost deference toward that other branch of the government, is compelled to say that no one in the exercise of human reason and discretion could honestly reach a conclusion that distinctions exist having any relation to the purpose and policy of the legislation, can it deny its validity."

The legislature having exempted from the operation of this law peddlers of agricultural and farm products, and vendors of books, periodicals, and newspapers, thus placing them in a different class from other peddlers, we do not think it can be said that such a classification is wholly without reason, and foreign to all legitimate purpose of the legislation. Reasons quite satisfactory to some minds could be advanced for exempting peddlers of farm products from a license law, and

the same can be said of vendors of books, periodicals, and newspapers; while on the other hand, there may be room for argument to the contrary. We refer to reasons and arguments relating to some legitimate purpose of the law. The very fact that there is room for honest difference of opinion in this respect shows that it is a question of policy, and not of power in the legislature to pass the law. We are of the opinion that a license law such as this, whether its object be regulation or revenue, is not a grant of privileges or immunities to a class of citizens which, upon the same terms, do not equally belong to all, because it classifies peddlers with reference to the different kinds of goods they sell. *Stull v. De Mattos*, 23 Wash. 71, 62 Pac. 451, 51 L. R. A. 892; *People v. Smith*, 147 Mich. 391, 110 N. W. 1102; *Ex parte Heylman*, 92 Cal. 492, 28 Pac. 675; *Howe Machine Co. v. Cage*, 68 Tenn. 518; *Machine Co. v. Gage*, 100 U. S. 676, 25 L. Ed. 754; *Singer Mfg. Co. v. Wright*, 97 Ga. 114, 25 S. E. 249, 35 L. R. A. 497; *Borough of Warren v. Geer*, 117 Pa. St. 207, 11 Atl. 415.

It is urged that the law discriminates arbitrarily and without reason between peddlers in cities and towns and elsewhere in the state, by exempting the former when their licensing is regulated by ordinance of such cities and towns. Like the other classification we have noticed above, it seems to us this is a question of legislative policy. As a revenue measure the legislature certainly is authorized to delegate the power to cities and towns and suspend the operation of the law there, when such cities and towns act on the subject, and it is not necessary to the preservation of equal rights that the police power of the state should be exercised by uniform regulations all over the state. Classification of the people of different localities with reference to population, or with reference to cities and towns, is within legislative discretion. *State v. Evans, supra;* Gray, Lim. of Taxing Power, § 1424.

The law is also assailed upon the ground of the unequal license fees exacted from peddlers by reason of their different

modes of travel, and conveyance of their goods, in reaching the public. That such a classification for the purpose of measuring the license fee is not an unwarranted basis of discrimination is pointed out by the very pertinent language of the supreme court of Wisconsin, in *Servonitz v. State*, 133 Wis. 231, 240, 113 N. W. 277, 126 Am. St. 955:

"No reason which appeals very strongly to our judgment is advanced why peddlers should not be classified, as in the law in question, according to their facilities for going from place to place and carrying their wares. The perils to be guarded against in respect to the occupation and the contributions that may reasonably be required to the public revenues, strongly suggest, if they do not demand, such classification. Certainly the legislature, within the boundaries of reason, may well have thought that a person traveling about the country plying the vocation of a peddler with an equipment consisting of a span of horses and a wagon should, both as a matter of police regulation and taxation, pay a greater license fee than a person plying the same trade but traveling about from place to place on foot. Not because the former would be more liable to be dishonest than the latter but because of the greater opportunity and liability thereof in the one case than in the other, and the corresponding greater liability in the one case than in the other of the harm, if committed, being difficult of redress or going entirely without remedy; again, not because the person, as such, traveling with a team should be taxed more than one traveling on foot, but, since the one in all reasonable probability would conduct a much greater business than the other, the tax exaction should bear some practical relation thereto."

It is contended that the proviso in the latter part of § 3 of the act renders it unconstitutional, in that it has the effect of making all licenses expire on the second Monday of January in each year, while the fee required is the same in amount where one licensee procures his license at the beginning and another at the end of the year, thus exacting from one a fee proportionately several times more than the other. In view of the fact that this law is evidently intended as a revenue measure as well as for regulation under the police power,

such contention would have some support if the proviso were given effect, and is not void by reason of its repugnancy to the body of the law. After providing for the payment of the license fee, the law reads:

"The county treasurer shall thereupon issue to said applicant a peddler's license, authorizing him to do business in the county aforesaid for the term of one year from the date thereof: *Provided*, That the license issued under and by virtue of this act shall expire by limitation on the second Monday of January succeeding the year of which said license was issued." Laws 1909, p. 737, § 3.

It seems to us that this proviso is so clearly inconsistent with, and repugnant to, the body of the act fixing the annual fee and declaring that the license shall be issued to the applicant, "*authorizing him to do business . . . for the term of one year from the date thereof*," as to render it wholly inoperative, even though there should be no constitutional objections to it. In the case of *Nathan v. Spokane County*, 35 Wash. 26, 76 Pac. 621, 102 Am. St. 885, 65 L. R. A. 336, this court noticed the distinction made between the effect of a saving clause and a proviso, by some courts which hold that a saving clause repugnant to the enacting part of the law is void, while a proviso repugnant to the enacting portion will control. From the language of the opinion in that case, the court apparently entertained the view, though the decision did not rest upon the exact point, that there was no sound reason for such distinction, but that both would be equally rejected when repugnant to the purview of the act, quoting from 1 Kent's Commentaries, 463, where such view is expressed. The following may also be cited in support of this view: *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031; *Jackson v. Moye*, 33 Ga. 296; *Penick v. High Shoals Mfg. Co.*, 113 Ga. 592, 38 S. E. 973; *Dugan v. Bridge Co.*, 27 Pa. St. 303, 67 Am. Dec. 464; 26 Am. & Eng. Ency. Law (2d ed.), 681. We are of the opinion that, where a proviso is wholly repugnant to the purview of the law, as

it is here, it is inoperative and void. This results in the license fee being uniform.

There would be some ground for contending that the fee charged for the license is excessive if the law be regarded only as a police regulation; but we see no reason for imputing to the legislature an intention other than to exercise both the police and taxing power in its passage. This view of the law was entertained by Judge Hanford of the Federal court of this district, in *Ex parte Crowder*, 171 Fed. 250, where it was held the law did not violate the equal rights provisions of the state or national constitutions, either in its discrimination between the classes it recognizes, in the excessiveness of the license fee, or in the other conditions imposed.

We are of the opinion that the law does not violate any rights guaranteed by the state or national constitutions, and that petitioner's prayer for the writ should be denied. It is so ordered.

DUNBAR, CROW, FULLERTON, GOSE, and CHADWICK, JJ., concur.

[No. 8126. Department One. October 19, 1909.]

ANNA SCHELLER *et al.*, *Appellants*, v. PIERCE COUNTY, *Respondent*.[1]

HIGHWAYS—ESTABLISHMENT—PRESCRIPTION. To create a highway by prescription the use or possession must be open, notorious, continuous and adverse; and none is shown where it appears that the use, in all for about eighteen years, was commenced under a temporary grant of a right of way to a county limited to five years, after which time the county refused to expend money because the right of way had expired or was in dispute, until immediately preceding the commencement of the action, over the owners' protest, and that the owners at all times paid taxes thereon, and from time to time maintained gates; since nothing transpired to convert the permissive use into an adverse use.

[1]Reported in 104 Pac. 277.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 5, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to restrain a county from interfering with fences constructed across a temporary right of way. Reversed.

Lueders & Phelps, for appellants.

J. L. McMurray and *F. D. Oakley*, for respondent.

RUDKIN, C. J.—During the year 1890 the board of county commissioners of Pierce county laid out a public road along the section line between sections 21 and 22, in township 20, north, of range 2 E., W. M. Albert Whyte and wife then owned one hundred and forty-five acres in section 22, abutting on the proposed road. At that time the board did not deem it advisable to construct the new road the entire distance along the section line, because of the expense of bridging a slough adjacent to the Whyte lands. The board therefore procured from Whyte and wife a temporary dedication or grant of a right of way across the above described lands, which appears in the abstract of title in evidence in the following words:

"Do grant, convey and dedicate to the county of Pierce, Washington, for the use of the public as a county road the following lots, pieces or parcels of land, situate, lying and being in the county of Pierce and state of Washington and particularly bounded and described as follows, to wit: Thirty feet on each side of a line described as follows: Beginning at a point 26.21 chains east of the southwest corner of section 22, township 20, north of range 2 east, run N. 37° 30′ W., 7.23 chains, thence N. 16° W. 4.15 chains, thence east 4 chains, thence S. 53° 30′ east 16.30 chains. To have and to hold the said premises unto the said Pierce county and its successors for the use of the public for a term not exceeding five years from the date hereof, at which time said tract shall revert to these grantors."

The road was thereupon constructed over the right of way

described in the foregoing grant, and has been used from that time up to the present. There is testimony tending to show the following facts: The county expended public money in constructing and repairing a bridge across the slough on the Whyte land from time to time, but the greater part of the expenditures were made either during the five-year period covered by the written contract, or over the plaintiffs' protest immediately preceding the commencement of this action. The road has been used for about eighteen years in all by all persons desiring to travel the same. The county, at different times, refused to expend public money on that portion of the road in controversy, either because it had no right of way for the road or because the right of way was in dispute. The plaintiffs and their predecessors in interest have at all times paid taxes on the right of way over their lands, and at different times maintained gates across the right of way to exclude stock. The present action was instituted by the successors in interest of the Whytes, to restrain the county and its officers from tearing down or interfering with fences constructed across the right of way on the Whyte land. The county defended on the sole ground that the *locus in quo* was a public highway, and this is the sole question involved in the case. The court below found that there was a public highway by prescription, as claimed by the county, and dimissed the action. From this judgment, the property owners have appealed.

A highway may exist by prescription in this state. *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Yakima County v. Conrad*, 26 Wash. 155, 66 Pac. 411; *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 516. At the same time all the essential elements of adverse possession must be present. The possession or use must be open, notorious, continuous, and adverse. *Shell v. Poulson*, 23 Wash. 535, 63 Pac. 204; *Watson v. County Commissioners of Adams County*, 38 Wash. 662, 80 Pac. 201.

Under the admitted facts in this case, it seems to us that

the use by the public was not adverse or in hostility to the title of the true owners. There was clearly no adverse holding during the period covered by the written contract, and nothing transpired after that time to convert the permissive use into an adverse use, except mere lapse of time. Ordinarily this will not suffice.

"If the use of a way over one's land is shown to be permissive only, no right to use it is conferred, though the use may have continued for a century or any length of time. 'A different doctrine would have the tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man, by allowing his neighbor to pass through his farm without objection over the pass way which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the passage way to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue. To create the presumption of a grant of a right of way, the circumstances attending its use must be such as to make it appear that it was established for the benefit of the claimant, or that its use was accompanied by a claim of right, or by such acts as manifested an intention to enjoy it, without regard to the wishes of the owner of the land. The use must have been enjoyed under such circumstances as will indicate that it has been claimed as a right, and has not been regarded by the parties merely as a privilege revocable at the pleasure of the owner of the soil.'" Jones, Easements, § 282.

Again:

"If the use of a way was begun under a license to one who afterwards repudiated the license, he can acquire a right by prescription only by use of the way for the period of limitation, after he has repudiated the license, and claim a right in himself, adverse to the owner of the land, with knowledge of such claim and acquiescence in it by the owner of the land." Id., § 284.

"If permissive in its inception, then such permissive character being stamped on the use at the outset, will continue of the same nature and no adverse user can arise until *a distinct and positive assertion of a right hostile to the owner, and brought home to him,* can transform a subordinate and friendly holding into one of an opposite nature, and exclu-

sive and independent in its character." *Pitzman v. Boyce*, 111 Mo. 387, 392, 19 S. W. 1104, 33 Am. St. 536.

See, also, *Nelson v. Nelson*, 41 Mo. App. 130; *Hurt v. Adams*, 86 Mo. App. 73; *Pennsylvania R. Co. v. Hulse*, 59 N. J. L. 54, 35 Atl. 790; 14 Cyc. 1151; *Shell v. Poulson*, and *Watson v. County Commissioners*, *supra*.

The judgment of the court below is reversed, with directions to enter judgment in accordance with the prayer of the complaint.

CHADWICK, GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8085. Department One. October 19, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. C. T. EAID, *Appellant*.[1]

PERJURY—INDICTMENT—SUFFICIENCY. Under Bal. Code, § 7185, making it perjury for any one to wilfully, and contrary to his oath taken in cause, state as true material matter which he knows to be false, and Id., § 7191, providing that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," the common law and statutory crimes are substantially the same, and an information good at common law is good under the statute.

SAME. An information charging perjury is sufficient where it clearly sets forth in ordinary language, without repetition, the substance of the controversy in which the oath was taken, the taking of the oath, the authority of the court, and proper allegations as to the falsity of the matter.

SAME — DUPLICITY — CRIMINAL LAW—TRIAL—ELECTION BETWEEN COUNTS. An information for perjury may embrace in a single count all the particulars in which the defendant is alleged to have sworn falsely, and it is not error to refuse to require the prosecution to make an election, upon a charge that the accused testified falsely that he did not know of the prior execution of a contract and did not know that Y. was the owner of certain property.

WITNESSES—IMPEACHMENT—PREJUDICE OR INTEREST—PERJURY. On a trial for perjury committed in a civil action, the accused has a

[1]Reported in 104 Pac. 275.

right to show that the principal witnesses against him are interested in the civil action, which was still pending for trial, and would profit by his conviction under Bal. Code, § 5992, rendering a person convicted of perjury incompetent to testify therein.

Appeal from a judgment of the superior court for Thurston county, Yakey, J., entered November 25, 1908, upon a trial and conviction of the crime of perjury. Reversed.

J. A. Hoshor, for appellant.

John M. Wilson, for respondent.

RUDKIN, C. J.—The appellant was convicted of the crime of perjury, and the present appeal is prosecuted from the final judgment and sentence of the court. A demurrer interposed to the indictment was overruled, and upon this ruling the first error is assigned. The charging part of the indictment, so far as material to the present inquiry, is in these words:

". . . and whether or not the said C. T. Eaid was aware of and knew on the 21st day of October, 1907, and subsequently thereto knew that one E. T. Young was the owner or claimed to be the owner of a certain donkey engine mentioned and set forth and described in the said contract, and the said witness, C. T. Eaid, did then and thereupon his oath taken as aforesaid in the said cause, feloniously, wilfully, falsely and corruptly and knowingly, and contrary to such oath depose and swear among other things, in substance to the effect following, that is to say: That he, the said witness, C. T. Eaid, did not know of the prior execution of the said contract on or about Oct. 21, 1907, and did not know that the said E. T. Young was the owner or claimed to be the owner of the said donkey logging engine together with float and appurtenances set forth in the said instrument in writing, to wit: the said contract hereinabove set forth on or about Oct. 21, 1907, whereas, in truth and fact the said witness, C. T. Eaid did know of the prior execution of the said instrument and contract in writing on or about Oct. 21, 1907, and was present at the time and place when the

said instrument in writing and contract was signed and executed, and did actively participate and take part in the preparation and execution thereof and did know at the said time of the execution of the said contract, to wit: on the 21st day of October, 1907, that the said E. T. Young was the owner and claimed to be the owner of the donkey logging engine with float and appurtenances as set forth and described in the said instrument in writing, and that the said witness, C. T. Eaid, feloniously, wilfully, falsely, and corruptly and knowingly, contrary to the said oath as aforesaid, in the manner and form as aforesaid, did then and there commit the crime of perjury, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Washington."

The particular objection urged in support of the demurrer is that the indictment fails to charge that the appellant *stated as true* the facts or matters upon which the perjury was assigned. Bal. Code, § 7185 (P. C. § 1695), defines the crime of perjury as follows:

"Every person who, having taken an oath that he will testify, declare, depose, or certify truly before any competent tribunal, officer, or person in any of the cases in which such an oath may by law be administered, wilfully and contrary to his oath, states as true any material matter which he knows to be false, is guilty of perjury."

The requisites of an indictment or information for perjury are thus stated:

"In an indictment or information for perjury, or subornation of perjury, it is sufficient to set forth the substance of the controversy or matter in respect to which the crime was committed, and in what court or before whom the oath alleged to be false was taken, and that the court or person before whom it was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned; but the indictment or information need not set forth the pleadings, record or proceedings with which the oath is connected, nor the commission or authority of the court or person before whom the perjury was committed." Bal. Code, § 6857 (P. C. § 2110).

Other sections of the code bearing on the question under consideration are as following:

"Words used in a statute to define a crime need not be strictly pursued in the indictment or information, but other words, conveying the same meaning, may be used." Bal. Code, § 6849 (P. C. § 2102).

"The indictment or information is sufficient if it can be understood therefrom, . . . (6) That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; (7) That the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case." Bal. Code, § 6850 (P. C. § 2103).

"No indictment or information is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of any of the following matters, which were formerly deemed defects or imperfections:— . . . (4) For any surplusage or repugnant allegation, or for any repetition, when there is sufficient matter alleged to indicate clearly the offense and the person charged; nor (5) For any other matter which was formerly deemed a defect or imperfection, but which does not tend to the prejudice of the substantial rights of the defendant upon the merits." Bal. Code, § 6851 (P. C. § 2104).

Our statutory definition of perjury does not differ materially from the definitions found in Hawkins, Bacon, Blackstone and other common law writers. Blackstone defines it as:

"A crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears wilfully, absolutely and falsely, in a matter material to the issue or point in question." 4 Blackstone, Commentaries, 137.

See, also, 2 Hawkins, Pleas of the Crown, chap. 69, § 1; Bacon's Abridgment, title Perjury.

There is, perhaps, this difference between perjury as defined by Bal. Code, § 7185 (P. C. § 1695), and perjury at

common law; under the statute the testimony itself must be false, while the common law punished the taking of a false oath, and a person was guilty of perjury if he swore to a fact of which he knew nothing, whether it be true or false. Bal. Code, § 7191 (P. C. § 1701), provides that, "An unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," and when the two sections are construed together, the common law and statutory crimes are substantially, if not identically, the same. If so, we see no reason why a common law indictment should not be good under the statute, and the indictment under consideration follows the approved common law forms. See, 2 Archibold, Criminal Practice and Pleading, 1738; Bishop, Directions and Forms, § 871, *et seq.*, and authorities cited.

Furthermore, the act or omission charged as a crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. The indictment sets forth the substance of the controversy in which the crime was committed, in what court the oath alleged to be false was taken, that the court before which the oath was taken had authority to administer it, with proper allegations of the falsity of the matter on which the perjury is assigned. This, in our opinion, satisfies all the requirements of the law. A doubt as to the sufficiency of an information charging the crime of perjury in almost the identical language of this indictment was suggested in *State v. Guse*, 21 Wash. 209, 57 Pac. 831, but the point was not decided, and further consideration convinces us that the doubt was not well grounded.

The indictment charged that the appellant testified that he did not know "of the prior execution of the said contract on or about October 21, 1907, *and* did not know that the said E. T. Young was the owner, or claimed to be the owner, of said donkey engine." At the commencement of the trial

the appellant moved the court to require the prosecution to elect upon which charge it would rely, but the motion was overruled and, upon this ruling, the second error is assigned.

"An indictment for perjury may embrace in a single count all the particulars in which the defendant is alleged to have sworn falsely; but each fact sworn to should be stated in definite and separate assignments, and each traversed, so that if either assignment is proved, the indictment may be sustained. If one assignment of perjury is sufficient, an improper assignment in connection with it will not vitiate the indictment. The fact that an indictment charges two distinct false statements under oath does not render the indictment bad if the statements were both given under one oath and in one proceeding." 30 Cyc. 1439.

There was no error in the ruling complained of.

The appellant at the trial offered to prove the status of the civil action in which the false testimony is alleged to have been given, but an objection interposed by the state was sustained. This ruling was erroneous and prejudicial. The defendants in the civil action were the principal witnesses against the appellant on the trial of the criminal prosecution. If the judgment appealed from is affirmed, the appellant is rendered incompetent to testify in the civil action or any other case, unless he shall receive a pardon. Bal. Code, § 5992 (P. C. § 938). The defendants in the civil action would profit by the conviction of the appellant to that extent, and it was clearly competent to show that fact and to have the jury properly instructed as to the effect of the conviction. In practice a prosecution for perjury is frequently continued until the proceeding in which the perjury is alleged to have been committed is ended. 30 Cyc. 1324. But if not continued, and the parties to the pending civil action are witnesses against the accused on the trial of the criminal action, the accused has an unquestionable right to show that they will profit by his conviction. For some reason the civil cause had not been decided at the time of the trial of the present action—perhaps because of the death of the pre-

siding judge—and the appellant was permitted to show that fact; but he had a right to go further and show that the civil action was still pending and for trial. Reversed and remanded.

GOSE, MORRIS, CHADWICK, and FULLERTON, JJ., concur.

[No. 8089. *En Banc.* October 20, 1909.]

HARRY GREEN, *Appellant*, v. SPOKANE COUNTY, *Respondent*.[1]

LIMITATION OF ACTIONS—MONEY COLLECTED ON ERRONEOUS JUDGMENT—ACCRUAL—PENDENCY OF APPEAL. Where a judgment upon a bail bond in favor of a county was collected on execution, and afterwards reversed on appeal and the action dismissed, limitations upon the right of action against the county to recover the money collected do not commence to run until the reversal of the judgment; since until that time the former judgment could be pleaded in bar and no action could have been maintained.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 29, 1908, in favor of the defendant, upon sustaining a demurrer to the complaint, in an action against a county to recover money collected upon a bail bond. Reversed.

William S. Lewis, for appellant.

Fred C. Pugh, *Don F. Kizer*, and *A. C. Clausen*, for respondent.

DUNBAR, J.—On October 14, 1901, a judgment was recovered in the superior court of Spokane county, in favor of the state of Washington, and against the plaintiff and appellant, Harry Green, for $500, and against his assignors for certain other sums, in a certain action then and there pending, entitled State of Washington v. W. A. Lewis. The

[1]Reported in 104 Pac. 510.

judgment was taken on a bail bond on which the appellant and his assignors were sureties. After the entry of the judgment, execution issued, and the amount of $500 was recovered from the appellant, and the other amounts mentioned from his assignors. Under the statute the moneys collected on recognizance and bail bonds become property of, and belong to, the county from which the case came, and pursuant to this statute, the aforesaid sums of money were paid directly to the county commissioners of Spokane county, and are still retained by said Spokane county. Thereafter, on appeal prosecuted by some of the sureties, the supreme court reversed the said judgment against said sureties, and held that the state of Washington had no just cause of action against them. *State v. Lewis*, 35 Wash. 261, 77 Pac. 198.

Pursuant to this opinion and the remittitur of the supreme court in said cause, on application of appellant and said sureties, the superior court, on the 20th day of September, 1904, vacated and set aside the erroneous judgment and all proceedings attempted to be had against such sureties in said action, and dismissed said proceeding at the cost of the state. Thereafter demand was made upon the county commissioners of Spokane county for the return of said moneys, which was refused, and this action was brought by the appellant to recover said moneys. A demurrer was interposed to the complaint, and sustained by the court. Judgment was entered in favor of the respondent, and from such judgment this appeal is taken.

The history of the case given is set forth in the complaint. The moneys were collected on the judgment October 14, 1901. The judgment and proceedings of forfeiture were set aside and the action dismissed on September 24, 1904. The present action was instituted on September 12, 1907. It is conceded that the three-year statute of limitations applies to the action at bar, and it is the contention of the respondent that the statute should begin to run from the

time of the taking or appropriation of the money by the county; while it is contended by the appellant that the statute does not commence to run until the reversal of the judgment by the supreme court. This is the sole question in the case.

Our statute provides that actions must be commenced within certain times specified from the time the cause of action arises, and it is earnestly urged by the respondent that the cause of action arose when the money was wrongfully taken or appropriated. In one sense this is true, but rules of law are not intended to work a deprivation of rights, and should not be so construed when it can be avoided; and while perhaps in one sense the cause of action might be said to have arisen when the money was appropriated by the county, in a larger and juster sense it did not arise until such time as a suit for recovery could be instituted and maintained. It is inconsistent to say that you have a cause of action without any right to bring it, and it is incontrovertible that the judgment, before it was reversed, could have been successfully pleaded as a bar to any action which the appellant could have brought for the recovery of the money. It might have occurred that the reversal of the judgment by the supreme court was not effected until more than three years had expired from the appropriation of the money by the county. In such a case the remedy of the appellant would have been entirely destroyed.

The respondent relies upon the case of *Spinning v. Pierce County*, 20 Wash. 126, 54 Pac. 1006, and thinks that that case cannot be distinguished from the case at bar. But an examination of that case convinces us that it is not at all in point. That was a case where money arising from a sheriff's commission wrongfully charged on foreclosure sales had been paid into the county treasury, and the court decided that the statute of limitations began to run against actions to enforce repayment from the date such money was paid into the treasury, and not from the date of demand

therefor on the county, although an action would not lie until after the demand for repayment. It will be seen that there was nothing to prevent the parties in that case from commencing their action at any time, by simply making a demand for the return of the money; and the decision of the court, to the effect that the statute began to run from the date such money was turned into the treasury, and not from the date of the demand, was simply to prevent parties from extending the statute of limitation by neglecting or refusing to make a demand which they had a right to make at any time. This identical question has not often, so far as we have been able to ascertain, been presented to courts for determination, and the only case which we have been able to find where the exact question has been determined is *Crocker v. Clements' Adm'r*, 23 Ala. 296. There it was distinctly decided that, where a person received money under a decree which was afterwards reversed on error, the statute of limitations commenced to run in his favor from the reversal.

The judgment will be reversed, with instructions to overrule the demurrer to the complaint.

ALL CONCUR.

[No. 7714. *En Banc.* October 20, 1909.]

ELLA H. HOLLY, *Respondent*, v. HUGH MUNRO *et al.*, *Appellants*.[1]

TAXATION—JUDGMENT AND SALE—VACATION—MERITS—TENDER OF TAX. The rule that an action to vacate a judgment cannot be maintained without an allegation of a meritorious defense has no application to proceedings to vacate a void tax judgment, the statute requiring only a tender of the taxes paid; such tender and the validity of the tax judgment being, moreover, a meritorious defense.

JUDGMENTS—RECITALS—PRESUMPTIONS—FINDINGS OF FACT. The rule that recitals in a judgment showing jurisdictional facts raise a presumption of jurisdiction has no application to recitals in findings of fact, especially in an equity case where findings are not necessary.

[1]Reported in 104 Pac. 508.

SAME—EVIDENCE OF SERVICE—PRESUMPTIONS. The presumption from recitals of due service of process in a judgment is only *prima facie* and may be overcome by proof that none other than the void summons on file was served.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered March 16, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Post, Avery & Higgins, for appellants.

Osee W. Noble and *S. Douglas*, for respondent.

DUNBAR, J.—This is an action styled by the appellant, "an action to set aside a judgment obtained in tax foreclosure proceedings"; by the respondent, "an action to quiet title." Whatever name may be applied to it, the complaint asked for relief upon the ground that the sale of the property, which was made for the collection of taxes, was made under a void judgment by reason of an insufficient summons, which it is alleged was void and of no force or effect; and that no other, further, or different summons was ever issued, filed, served, or published in said action. The defendants admit that the summons set forth in the complaint was published, but deny the other allegations just mentioned. A demurrer to the complaint was overruled by the lower court and on a trial on the merits, the court denied defendants' motion to dismiss the action, on a challenge to the sufficiency of the evidence and the allegations of the complaint at the close of plaintiff's case, and at the close of defendants' case rendered a decree for the plaintiff. From this decree the defendants appeal.

The assignments are that the court erred in overruling the demurrer to the complaint, and in denying defendants' motion to dismiss at the close of plaintiff's case. The first assignment is based upon the contention that this action is, in effect, an action to vacate a judgment, although in form

an action to quiet title or remove a cloud; that the result from the one form of action is identical with the result from the other; that the name by which the action is christened is quite immaterial, and that, being in fact an action to vacate a judgment, there should have been an allegation of merits.

It is undoubtedly the general rule, which has been uniformly sustained by the decisions of this court, that one seeking the assistance of a court of equity for the purpose of vacating a judgment must show that the former judgment was inequitable and that he had a good and sufficient defense in whole or in part to the action; for a court of equity will not do an idle thing and open a judgment simply because the proceedings have failed to comply with the forms of law, at the instance of a petitioner who would not be benefited by such action of the court. But this court, in *Gould v. White*, 54 Wash. 394, 103 Pac. 460, held that the rule did not apply to an action to set aside a tax judgment, that a tender of all the taxes paid seemed to be the sole requirement of the statute, and that the defendant could not insist upon more; citing *Hauswirth v. Sullivan*, 6 Mont. 203, 9 Pac. 798, where the reason for the distinction is forcibly announced. Under the authority of this case the complaint was sufficient, there being an allegation of tender of all the taxes due, and of the deposit of the amount tendered in court upon the refusal of the defendants to accept the same. But, in reality, this is not an exception to the general rule, for the complaint approaches the demands of the rule as nearly as the nature of the action will permit. For if an allegation of ownership, of sale for taxes without notice and under a void judgment, and a tender of the taxes to the purchaser under such judgment, is not sufficient, then one must stand without remedy against the loss of his property, which is effected without due process of law.

On the other proposition involved, it is undoubtedly true that it is the rule of this court that the recitation in a judgment of jurisdictional facts sufficient to give the court juris-

diction to pronounce a judgment establishes the presumption of jurisdiction. But in all the cases decided by us to that effect, the jurisdictional fact was recited in the judgment, while the record in this case shows that such statement is only made in the findings of fact, while the judgment itself is silent on that subject. And while the judgment is based upon the findings, we do not think it wise to extend the rule beyond the solemn declarations of the judgment itself, especially in view of the fact that in this state findings are not required in equity cases, and are therefore not a part of the judgment roll. But, in any event, the recital of jurisdiction is only *prima facie* evidence, and while the testimony in this case is not absolutely convincing that no other summons was issued in the case, we think it is reasonably so, and are therefore not inclined to disturb the judgment of the trial court on that question.

The summons involved having been held to be void by this court, in *Young v. Droz*, 38 Wash. 648, 80 Pac. 810, the judgment will be affirmed.

ALL CONCUR.

[No. 8112. Department One. October 22, 1909.]

EXPOSITION AMUSEMENT COMPANY, *Appellant*, v. RAECO PRODUCTS COMPANY, *Respondent*.[1]

APPEAL—NOTICE—PARTIES TO BE SERVED. Upon appeal from an order of sale of appellant's property to satisfy one of several liens established by a judgment, in which only the appellant and such lien claimant are interested, notice of appeal need not be served on any of the other parties to the action.

APPEAL — RECORD — PRESERVATION OF GROUNDS — STATEMENT OF FACTS—QUESTIONS FOR REVIEW. Where the only question on appeal is the power to engraft an order of sale upon an original judgment, after modification on a prior appeal, a statement of facts and the entire record in the original action need not be brought up on appeal,

[1]Reported in 104 Pac. 509.

the original judgment, the motion, order of sale and notice of appeal being sufficient to review the question.

APPEAL—DECISION—JUDGMENTS — CONCLUSIVENESS — PARTIES AND MATTERS CONCLUDED. Where, upon an appeal by a surety company from a judgment establishing claims against it in favor of codefendants, the supreme court held that a certain lien claimant had no claim against the surety company, and neither the plaintiff nor the claimant had taken any appeal, the judgment of the lower court is conclusive as between them, and the supreme court cannot modify the judgment by a decision allowing the claimant to collect the amount of its lien from the plaintiff, nor can the superior court issue, or engraft upon the original judgment, an order of sale of plaintiff's property to satisfy the lien.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered January 2, 1909, granting defendant's motion for an order to sell real property in satisfaction of a judgment. Reversed.

Williamson & Williamson (*J. W. A. Nichols*, of counsel), for appellant.

Ellis, Fletcher & Evans, for respondent.

GOSE, J.—In December, 1907, a judgment was entered in the superior court of Pierce county in an action then pending therein, wherein the appellant herein was the plaintiff, and the respondent and the Empire State Surety Company et al. were defendants, in favor of the appellant and against the surety company, for $5,488.14. The judgment provided for its enforcement in the regular way, and that the proceeds thereof should be applied ratably in payment of the claim of the respondent, fixed at $465.45, and other claims established therein. The judgment further provided that the appellant, or any one of the defendants therein other than the surety company, could cause process to issue for its enforcement, "all in the name of the plaintiff," and that, upon full payment of all of the established claims, "the liens of the defendants herein and each of them be and shall become null and void, and of no further force and effect."

From this judgment the surety company only appealed. In considering the appeal on the merits, we held that the respondent had no claim against the appellant therein, and to that extent only modified the judgment. In denying a petition for rehearing, we said:

"The decision does not affect the right of the Raeco Company to recover the amount of its lien against the Exposition Amusement Company [the appellant here]. The lien of the Raeco Company was established both against the Amusement Company and the appellant. The Amusement Company did not appeal, and the judgment became final as to it." *Exposition Amusement Co. v. Empire State Surety Co.*, 49 Wash. 637, 96 Pac. 158, 97 Pac. 464.

Upon the filing of the remittitur in the lower court, and in October, 1908, the respondent here filed its motion in such court for a decree and order to sell certain real estate, the property of the appellant, to satisfy its claim, which being granted on January 2, 1909, this appeal was taken.

The respondent has moved to dismiss the appeal, on two grounds: (1) Because the notice of appeal was not served upon all the parties; (2) because no statement of facts or bill of exceptions has been settled or filed. The appellant and the respondent are the only parties affected by the order of sale. The notice was served upon the latter. This meets the demands of the law. The record here consists of the original judgment, the motion and order of sale, the notice of appeal, the order fixing a supersedeas bond, and the bond. The respondent contends that the entire record in the first case should have been brought up, in order that this court might have a proper understanding of the issues. This was not necessary. The only question to be reviewed is the power of the lower court to engraft an order for the sale of the appellant's property upon the original judgment. The record here presents this question. The motion will therefore be denied.

Upon the merits, as we have seen, in the original action, the appellant was the plaintiff and the surety company

the appellant, and others claiming liens were defendants. Neither the appellant nor the respondent here appealed from the former judgment. As between them, therefore, it was final, and to that extent this court had no jurisdiction to modify it. Their rights must be determined from an inspection of the judgment. The judgment was a personal one in favor of the appellant here and against the surety company. It established the respondent's claim, but only made it enforcible against the property of the surety company. That right having been taken from it upon appeal, it now stands as a litigant without a claim or a judgment. The judgment was in no sense one against this appellant. The respondent cannot invoke the record in the original suit anterior to the judgment. There must be a finality to judicial proceedings; otherwise, utter confusion would obtain. The rights of the parties merged in the judgment and were not subject to modification after the appeal, other than by this court. The language quoted from the opinion on rehearing was used under a misapprehension of the record. We were without jurisdiction to modify the judgment as between these parties. If the original findings of fact and conclusions of law justified the establishment of a lien upon the appellant's property and an order for its sale, they should have been carried into the judgment or decree, either at the time of its entry or upon proper and seasonable application before appeal.

The decree will be reversed, with directions to the trial court to deny the motion.

Rudkin, C. J., Morris, Fullerton, and Chadwick, JJ., concur.

[No. 8268. Department One. October 22, 1909.]

A. J. BURROWS, *Respondent*, v. W. W. SEYMOUR, *Appellant*.[1]

BROKERS—COMMISSIONS—AGREEMENT TO PAY—EVIDENCE—SUFFICIENCY. The verdict of a jury, for $1,000 for an agreed broker's commission, on the sale of a gas plant, should be set aside for want of any substantial evidence to justify it, where, in answer to special interrogatories, the jury found that the plaintiff represented that he had, and that he did have, an unexpired option to control the majority of the stock of the gas company, in consideration of which the defendant promised to pay the commission, and plaintiff testified that he could not swear that he had an option and was merely confident that there was an option, from statements made by his partner, and the other evidence conclusively showed that he never had any option.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered June 8, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Frank D. Nash, for appellant.

Marshall K. Snell and *Bertha M. Snell*, for respondent.

MORRIS, J.—The complaint herein sets forth two causes of action. The first sought a recovery in the sum of $1,000, as the reasonable value of services rendered appellant in his purchase of the Grays Harbor Gas Company. The second was based upon an alleged contract for the payment of $1,000, growing out of the following letters:

"Aberdeen, Wash. 6, 20, 06.

"Mr. W. W. Seymour,

"Tacoma, Wash.

"My dear Sir: Confirming telephone messages to you this date, I beg to advise you that I have decided to allow you to take up the matter of the purchase of the Grays Harbor Gas Co. direct with the principals, with the understanding that in the event of a sale, I am to receive from you a

[1]Reported in 104 Pac. 511.

commission of $1,000, to be paid upon completion of the transaction. This, I think, is in conformity with our conversation of last Saturday. My recollection of our conversation is that you agreed to pay me this commission in the event you buy regardless of the price paid. Kindly advise me if this is correct. You understand, of course, that I reserve the right to sell to other parties, with whom I have been negotiating. I am afraid that it will be useless for you to try to secure a lower price, as I believe that I could get as low a price as could be had. It will do no harm to try, although I expect to sell the plant at the price named unless you succeed in closing the deal before my parties are ready. Wishing you success I beg to remain,

"Yours very truly, A. J. Burrows.

"June 22, 1906.

"Mr. A. J. Burrows,
"Aberdeen, Wash.

"My dear Mr. Burrows: I acknowledge receipt of your letter of June 20th. You are correct in saying that your commission is to be $1,000, upon the completion of the transaction. I realize that you reserve the right to sell to other parties, but in case we get so far along as to get near a trade I would expect to have you give me an exclusive option. Will not ask it unless we are pretty near a trade. I expect to leave the city Monday and you might telegraph me or 'phone me upon receipt of this letter.

"Yours very truly, W. W. Seymour."

The complaint alleges that respondent furnished the names and addresses of the stockholders, and withdrew from any further connection with the sale, and that appellant, after taking the matter up with the individual stockholders, purchased the gas plant in March, 1907.

Appellant, answering, admits he received some information from respondent, but says such information was incorrect and misleading, and was not relied upon by him in making his purchase; that before he made such purchase, the dealings and transactions between appellant and respondent had fully ceased, and his negotiations as to the purchase of the plant were carried on with persons not made known to him by

respondent. He further says that he was induced to enter into negotiations with respondent upon representations that respondent had an option on the gas plant and could sell the same for $60,000 or $65,000; that such option would soon expire, and appellant must act quickly as other parties were then negotiating for the purchase of the plant; that he would not have entered into any agreement with respondent except for such representations, and that the same were not true.

The reply denied these affirmative allegations, and upon the trial the jury returned a verdict for respondent for $1,000. Certain special interrogatories were answered by the jury, to the effect that respondent represented that he had an option to control the majority of the stock; that he did have such option; that it had not expired at the time of appellant's purchase; that appellant purchased the stock of the gas company under the agreement he made with respondent, and that appellant did not abandon nor terminate his efforts to purchase the stock, under his negotiations with respondent. The court below withdrew the first cause of action from the consideration of the jury, during its instructions, and the verdict is based upon the second cause of action.

The error assigned here is insufficiency of the evidence to justify the verdict, appellant contending that there is no evidence to justify either the general or special verdicts. The weight of the evidence, and the existence or nonexistence of facts are ordinarily questions for the jury, it being the sole judge of the facts; so that, where there is substantial evidence to justify the verdict, its weight is for the jury, and its verdict will not be disturbed. But when the record discloses an entire lack of evidence to justify the verdict, it is equally the duty of the court to set the verdict aside. Although respondent in his reply denies the consideration of the agreement to pay him $1,000 was his representation that he had an option upon the stock of the Grays Harbor Gas

Company, it is apparent that respondent was not promising to pay appellant $1,000 for the privilege of purchasing this stock. There must have been something of value he expected to obtain for his payment of $1,000, and that something must have been respondent's representations that he was authorized to find a purchaser for this gas plant, and, when so found, had authority from the stockholders, or a controlling majority thereof, to effect a sale. This is found to be the fact by the first special verdict of the jury, in which it is found that respondent represented that he had an option to control the majority of the stock at the time of the agreement. Does the evidence then disclose any such option, or any authority on respondent's part to find the gas company in a sale?

A careful reading of all the evidence convinces us that he had no such option, nor any authority whatever to negotiate for a sale, and this conclusion is not reached by us by usurping the province of the jury, and determining the weight of the evidence; rather it is reached by failing to find any evidence at all, however slight, to justify such a holding, the evidence being all to the contrary. On May 19, 1906, respondent writes appellant: "My option expires on next Friday the 25th inst." On May 22 he writes: "I now have until the 25th of June to handle the proposition," confirming appellant's contention that he represented he had such option. Yet not in his testimony nor in any evidence produced by him is there any proof of the existence of such an option. His own testimony is as follows:

"There is more or less difficulty—to explain that proposition, the option. I cannot positively swear as to the option. I am confident that we had an option, but the relationship between the parties in the corporation— Mr. Nash: Just one word. Who do you mean when you say 'we?' A. I am speaking of myself in connection with my father. In taking this up with my father—he is a man 82 years old, and naturally his memory is not as clear as it once was—he stated that

he was confident that he had an option covering Mr. Hill's and Mr. Wadsworth's stock in the company, but that it had been disturbed. Mr. Nash: I object to the conversation between himself and father. The Court: Objection sustained."

This is no evidence to justify a finding that he had an option, and his father's letter, from which we will hereafter quote, shows his confidence was unfounded. Later on he again testifies:

"In connection with the option on the plant, while I have not been able to produce that option owing to the fact that it was given in my father's hands, and all of his correspondence and things of that kind were misplaced or destroyed following his breaking up in health, so that I haven't that option, I am positive of the existence of that option, however."

He later testifies that:

"Mr. Hill was the principal stockholder. Mr. Wadsworth was another one of the principals. My father was a stockholder and there was a man named Roth or Rolph. I would not say what the name is. I suppose fifteen or twenty local holders of from one to four shares."

Later he says, when asked if he had an option on Mr. Hill's stock or his father's: "I cannot say. If so, it was held through Mr. Wadsworth."

A Mr. Rogerson, acting for appellant, called on Mr. Wadsworth, in August, 1906, to ascertain if the stock could be purchased. Mr. Wadsworth's answer was that he would consider a proposition to sell at about $75,000, but that he personally did not control the company, he and Mr. Hill owning practically all the stock. From this it would appear that respondent was in error in stating that an option existed through Mr. Wadsworth. Mr. Hill testified that he never had any negotiations with respondent touching the sale of this stock; that he did not know respondent. As confirming appellant's contention that respondent never had any option or other authority to dispose of the gas plant, we find a letter from O. E. Burrows, the father of respondent, and the

one in whom respondent seemed to think this authority to sell existed. This letter is dated November 19, 1906, five months after respondent's assertion of his authority and power to dispose of this stock, and is addressed to Mr. Hill. We quote from it:

"I would have been glad to know the lowest price at which you and Mr. Wadsworth will sell your stock. I think it very probable that we can find a purchaser if the price is right."

It is evident from this letter that C. E. Burrows did not understand, as late as November, that he had any authority to negotiate a sale of this stock. The sale was consummated the following March by a Mr. Patterson, acting under a power of attorney from Hill. Much, therefore, as we regret to disturb the verdict, we are constrained to hold that there was no evidence to justify any finding that respondent had authority to sell this stock, either under an option or otherwise, and that this authority continued up to, and was the controlling factor in, the final purchase of the stock by appellant.

We have endeavored to show there was no consideration for the agreement upon which the second cause of action was predicated, and any judgment founded thereon is erroneous. The court below erred in refusing a new trial, and the judgment is reversed.

RUDKIN, C. J., FULLERTON, CHADWICK, and GOSE, JJ., concur.

[No. 8197. Department One. October 23, 1909.]

EMMA WILKIE, *Appellant*, v. CHEHALIS COUNTY LOGGING AND TIMBER COMPANY, *Respondent*.[1]

NEGLIGENCE—EVIDENCE—ADMISSIBILITY—FRIGHT OF HORSE. Where an old, gentle horse suddenly became frightened 100 or 150 feet from a platform, on which were milk cans and a quarter of fresh beef, and there was no direct evidence and nothing more than a bare probability as to the cause of his fright, it is inadmissible to prove that other horses driven past the platform at another time had become frightened, and that there was fresh beef piled thereon at the time, either as inference as to the cause of the accident or to show notice.

NEGLIGENCE—EVIDENCE—SUFFICIENCY—FRIGHT OF HORSE—PROXIMATE CAUSE. In such a case, the mere probability that the horse became frightened at the quarter of beef, is not an evidentiary fact that will sustain a judgment for damages, regardless of whether the platform as maintained was a nuisance; since it was not shown that the same was the proximate cause of the accident.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered February 1, 1909, upon granting a nonsuit after discharging the jury, dismissing an action for personal injuries. Affirmed.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for appellant.

John C. Hogan and *J. B. Bridges*, for respondent.

CHADWICK, J.—This action, brought by plaintiff, Emma Wilkie, in her own behalf, and another brought by her as guardian *ad litem* for her minor children, against the Chehalis County Logging and Timber Company, a corporation, are predicated upon the following facts: On January 16, 1907, David Wilkie and his wife Emma were returning to their home, near the city of Montesano. Their way proceeded along a road or street within the city limits. The road led over a swamp through which a roadway about ten

[1]Reported in 104 Pac. 616.

feet wide had been banked up, and thence up a steep hill. At the foot of, and encircling the hill at its base, the defendant has constructed and was operating a logging railroad. To the right or north of the crossing, about ten feet therefrom, the railroad company had maintained a platform upon which goods were placed for the more convenient loading of supplies for the logging camps. At the time mentioned, some goods, including milk cans and at least one quarter of beef, which was wrapped in burlap, excepting only a part of the shank, were upon the platform, placed there no doubt, although the testimony does not show it, for shipment upon defendant's road. Mr. Wilkie and his wife were driving a horse then seventeen years old. He had been in use on their farm for fourteen years. Their buggy was old and had been used from ten to twenty years. When they had approached within a distance varying, under the testimony, as we find it to be from a consideration of all the evidence, from 100 to 150 feet of the railroad crossing, the horse suddenly stopped, threw up his head, and backed the buggy at an angle off the grade, whirling at the same time toward the city. The buggy was overturned, and Mr. and Mrs. Wilkie were thrown out. The buggy was backed against or caught upon some posts, the remains of a dismantled building, so that the front wheels and axle became separated from the body of the buggy. The horse trotted back down the road toward Montesano for a short distance, where he was stopped without effort by a passer-by. The testimony shows that he was not frightened or running away. He showed no signs of that frenzy which marks the frightened animal. Mr. Wilkie received injuries of which he died, and Mrs. Wilkie suffered the injuries which she now seeks to satisfy in damages.

The theory of the plaintiff is that the accident was caused by the negligent use of the platform by defendant, in that it permitted a quarter of beef to be placed thereon, unprotected and uncovered from view, so that the horse became frightened by the sight and smell of it; this, coupled with the

allegation that the platform and its use had for a long time prior to January 16, 1907, become, and was, a public nuisance. From a judgment of nonsuit, the plaintiff has appealed.

It is assigned that the court erred in the rejection of testimony offered to show that horses had been frightened at objects placed upon the platform. A witness swore, over the objection of respondent, that on the day before, his team was frightened while passing the platform, and that meat was piled thereon at the time. This testimony was afterwards stricken by the court. In thus ruling the court did not err. It may be said, for the purposes of this argument, that it may be accepted as a matter of common knowledge, of which courts are bound to take notice, that some horses will become frightened at the sight or smell of fresh meat; but it does not follow that, because one horse is so frightened, another one will be. What would frighten one horse may pass unnoticed by another. But, under any view of the law, the testimony was not competent to prove the negligence of respondent, for there had been no direct evidence to prove that the horse driven by the Wilkies had become frightened at the meat on the platform. It did not so occur to Mrs. Wilkie at the time; and at the distance testified to, no more than a bare probability was proven. A probability cannot be turned into an evidentiary fact by proving a collateral fact which also rests upon probabilities or conditions that cannot be brought to the attention of the jury; all this, upon the well settled principle that negligence will not be presumed but must be proven, so often affirmed by this and other courts that it is not necessary to cite authorities, other than *Whitehouse v. Bryant Lumber & Shingle Mill Co.*, 50 Wash. 563, 97 Pac. 751, where the former decisions of this court are collected; to which may be added *Cleveland etc. R. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, 5 Am. St. 644.

The only question leaving any room for argument in this case is the distance between the point where the horse stop-

ped and backed the buggy, and the railroad track and platform. As we have said, there can be no doubt that the accident occurred at least 100 feet from the railway track and from 110 to 115 feet from the platform. It is true that Mrs. Wilkie, although admitting that she is not a good judge of distances, said that it was 25 or 30 feet, and in another place 30 or 40 feet, but she also said that the horse backed a short distance, several feet, when he whirled. She and her husband were thrown out when he whirled around. She fixes this point at from 100 to 125 feet from the track. Another witness fixes the place where she was thrown out at 150 to 160 feet from the track. This testimony makes it extremely improbable that the horse was within 100 feet of the track at the time, and quite as improbable that he was frightened at anything on the platform; especially so when, in connection with the distance, we consider the fact that the horse was old, gentle, accustomed to being driven double and single, had never shied before, and was accustomed to the road which they were traveling and upon which there were several platforms placed for the convenience of dairymen, and the extreme improbability that a horse would or could back a buggy straight along a road no more than ten feet wide, for a distance approximating 80 to 125 feet.

If it were admitted, or could be found from the evidence, that the horse was in fact frightened by the objects on the platform, the question whether defendant was liable would then occur. In that event it would be competent to show that other horses had been frightened, in order to charge the respondent with notice of the fact. But appellant's testimony did not contain the essential element of certainty, and the court properly rejected the testimony. Liability does not rest in the negligent act, but upon proof that the act of negligence was the proximate cause of the injury. Appellant cites many authorities showing that improper use of a highway is a nuisance, but it does not follow that an individual can recover damages in an action of this kind because

of its maintenance, unless it be shown by competent evidence, attaining a higher degree than conjecture evidence, that he has suffered an injury because of it. So, whether the testimony was offered to prove that, because other horses had been frightened, the inference that the Wilkies' horse had been also frightened could be drawn therefrom, or to charge respondent with notice, it was properly rejected, for notice is immaterial unless negligence is proven.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8374. Department One. October 23, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Frank J. Scougale et al., Plaintiff*, v. THE SUPERIOR COURT FOR PIERCE COUNTY, *Respondent*.[1]

MANDAMUS—WHEN LIES—CHANGE OF VENUE—REMEDY BY APPEAL. The remedy by appeal is inadequate, and mandamus lies to correct an improper change of venue; since the supreme court cannot assume that jurisdiction will be assumed in the wrong county; nor on appeal from a judgment in such county, direct a trial in the proper county.

VENUE—CHANGE—TRANSITORY ACTION. An action to establish and enforce a trust in real and personal property is transitory, as the decree acts *in personam*, and the venue is properly changed to the county of defendants' residence.

Application filed in the supreme court, September 28, 1909, for a writ of mandate directing the superior court for Pierce county, Shackleford, J., to proceed with the trial of a cause, after granting a change of venue on application of the defendants. Writ denied.

Fogg & Fogg and *Jesse Thomas*, for relators.

Coleman & Fogarty, for respondent.

[1]Reported in 104 Pac. 607.

Gose, J.—The relators brought an action, in the superior court of Pierce county, against Dominic Cavalero and wife and Norval McGhie and wife, as defendants. The complaint, in substance, states that, in the fall of 1906, the relator Frank J. Scougale held options for the purchase of the standing timber on certain tracts of land in Pierce county; that he induced the defendants to take a one-third interest each therein; that the relator thereupon, at the instance of the defendants, closed the options, purchased other adjoining timber land in fee, paying therefor with money furnished by the defendants; that the title was taken in the name of the Gig Harbor Timber Company; that each of the parties owned a one-third interest in the joint adventure, the defendants to be paid for the relator's interest by a sale of the logs; that the defendants, in violation of their agreement with the relator to cut and remove the timber from the land upon which the options were obtained, permitted the options to expire without doing so, to the damage of the relators in the sum of $42,000; that the defendants now deny that the relators have any interest in either the land or the timber, and have procured contracts extending the time for removing the timber in the name of defendant Cavalero or his son.

The relators prayed, (1) that their title be established to an undivided one-third interest in the land and timber; (2) that the land and timber be sold and the proceeds divided between the parties according to their several interests; and (3) for a judgment for damages. Thereupon the defendants in due form applied to the court for a change of venue to Snohomish county, the place of their residence. The relators resisted the application, on the ground that the title to real and personal property was involved, and the action was local, under the provisions of our code, Bal. Code, § 4852 (P. C. § 308). This objection was overruled, and the application allowed. The relators thereupon applied to this court for a writ of mandate, directing the court below to proceed with the trial of the cause, basing their right to the writ

upon the same grounds urged in the court below against granting the application.

The respondent demurred to the application, and first urges that the relators have an adequate remedy by appeal, and that mandamus does not lie. This view is not sustainable. If the change of venue was erroneously made, we cannot presume that the superior court of Snohomish county will assume to exercise jurisdiction; nor could we, upon an appeal from that court, direct the superior court of Pierce county to proceed with the trial. The remedy by appeal is therefore inadequate. *State ex rel. Wyman etc. Co. v. Superior Court*, 40 Wash. 443, 82 Pac. 875, 111 Am. St. 915, 2 L. R. A. (N. S.) 568; *State ex rel. Miller v. Superior Court*, 40 Wash. 555, 82 Pac. 875, 111 Am. St. 925, 2 L. R. A. (N. S.) 395.

The respondent next urges that the action is transitory. In its final analysis the purpose of the action, aside from the question of damages, is to establish and enforce a trust in real and personal property. In such cases the decree acts *in personam*, and the action is a transitory one. *State ex rel. Campbell v. Superior Court*, 7 Wash. 306, 34 Pac. 1103; *Massie v. Watts*, 6 Cranch 148, 3 L. Ed. 181; *LeBreton v. Superior Court*, 66 Cal. 27, 4 Pac. 777.

The writ will be denied.

Rudkin, C. J., Fullerton, Chadwick, and Morris, JJ., concur.

[No. 8042. Department One. October 25, 1909.]

WILLIAM A. DENNEY, *Appellant*, v. NORTHWESTERN CREDIT ASSOCIATION *et al.*, *Respondents*.[1]

LIBEL AND SLANDER—LIBEL PER SE—CREDIT REPORTS. The report of a mercantile agency is not libelous *per se*, where it simply gave plaintiff a rating which is stated not to be a credit rating, but that the agency preferred to furnish information upon application at the office; since the words are to be considered in their natural sense, are innocent without the aid of special knowledge, and do not imply malice, or hold the party up to public ridicule or involve moral turpitude.

SAME—CREDIT REPORT TO COERCE PAYMENT. It cannot be said, as a matter of law, that such a publication was made to extort money or coerce payment of a debt held by the agency for collection so as to make the same libelous *per se*, within the rule allowing a recovery in the case of publications showing blackmail on their face.

SAME—SPECIAL DAMAGES—PLEADING. In order to render such a publication actionable, the words not being libelous *per se*, the special damages resulting from loss of credit must be specifically set out, showing the names of parties refusing credit or withdrawing custom, or that it is impossible to do so.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 8, 1909, upon sustaining a demurrer to the complaint, dismissing an action for libel. Affirmed.

A. A. Howell, for appellant.

Gordon & Remann, for respondents Andrews *et al.*

Ellis, Fletcher & Evans, for respondents Perkins *et al.*

CHADWICK, J.—We are asked to determine the sufficiency of the complaint in this action. It is alleged, in substance, that the defendant, the Northwestern Credit Association, maintains a collection agency and had for collection an account against plaintiff; that a part of its business was to give a commercial rating to individuals and firms; that the

[1]Reported in 104 Pac. 769.

Northwestern Credit Association published a book called the Northwestern Credit Book, also called the Confidential Credit Reference Book, which is distributed among its subscribers in the cities of Tacoma and Seattle, and that, among others, the name of plaintiff appears therein as follows: "'C'. Wm. A. Denney, 3415 N. 26th st."; that a key appeared in the book a part of which is as follows:

"A Key to Rating. 'A', Generally prompt. 'B', Good, somewhat slow. 'C', Inquire at office; it must be distinctly understood that this does not indicate a credit rating, but the information we have is such that in justice to the party and the association we prefer to furnish it upon application;"

that such publication was false and libelous and wilfully published by defendant association, being aided and assisted by the other defendants, for the purpose of coercing payment of a disputed account. Plaintiff further alleges that he has been refused credit and injured in his feeling and reputation, for all of which he claims general damages.

The trial court evidently sustained the demurrer of the several defendants upon the theory that the words published were not actionable *per se* and, for the want of an allegation of special damages, the complaint did not state a cause of action. The general rule is that all words alleged to be libelous should be considered by the court in their natural and obvious sense unless they be ambiguous. *Urban v. Helmick*, 15 Wash. 155, 45 Pac. 747. The office of the innuendo in pleading is to apply the libel to a person, or to connect such person with a place or thing of evil repute, and cannot be relied on to make words otherwise unobjectionable the basis of a recovery. 25 Cyc. 449-450; Newell, Slander & Libel, p. 619; Odgers, Libel and Slander, p. 106 *et seq.*; Townshend, Slander and Libel, § 335.

In all charges of this kind, it is the duty of the court to regard the words spoken or written as might a stranger to the parties, and if they be in themselves, and without the aid of the innuendo, otherwise innocent, and if they do not in

themselves, and without the aid of the special knowledge possessed by the parties concerned, imply malice, or hold the party out to public contempt or ridicule, or make any charge involving moral turpitude, or touch him in his business, or subject him to an infamous punishment, it is the general rule that they are not libelous *per se*. If the words do not come within this rule,

"It is necessary that the declaration should set forth precisely in what way the damage resulted from the speaking of the words. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that the party has been put to great costs and expenses. . . . By special damage in such a case is meant pecuniary loss." *Pollard v. Lyon*, 91 U. S. 225, 237, 23 L. Ed. 308.

See, also, 5 Ency. Plead. & Prac., 766; 25 Cyc. 455; *Dun v. Maier*, 82 Fed. 169; *Bradstreet Co. v. Oswald*, 96 Ga. 396, 23 S. E. 423; *Newbold v. Bradstreet & Son*, 57 Md. 38, 40 Am. Rep. 426.

Within these rules we are constrained to hold with the trial court in the construction of the complaint now before us. In *Woodruff v. Bradstreet Co.*, 116 N. Y. 217, 22 N. E. 354, 5 L. R. A. 555, publication was made that a judgment had been rendered against the plaintiff. In this case the association did not give a credit rating, but indicated that in justice to plaintiff such information as it had with respect to his commercial standing would be furnished upon application to any interested subscriber. If sought, the fact would have been revealed that it held for collection a disputed account. In principle there can be no difference between these cases. The court of appeals in that case held:

"The meaning of words in an action of slander or libel cannot be extended by innuendo beyond their import, aided, as they may be, by extrinsic facts with which they are connected. Its use or purpose is to explain the application of words by connection with such facts and circumstances as are alleged. There are none alleged here which will justify the inference that the publication issued by the defendant carried with it any meaning essentially different than it would

have taken from any other source. The fact that its apparent authenticity may have been greater is not important. The information sought to be given by the report was that a judgment had been recovered against the plaintiff for the amount, and, as the consequence, he was charged by it with liability to that extent. That was what the defendant's subscribers were permitted, from its report, to understand had occurred. It might or might not make inquiry, preliminarily to further credit, desirable. That might depend upon the known or unknown pecuniary ability of the party. In its relation to parties generally, such would be the uncertainty of its effect; and it is the rule in its general application and effect, as to all persons in the class before referred to, that is now under consideration, because the publication of such a statement when untrue is libelous *per se* in all such cases or in none. The fact that in some cases it might result in the denial of credit, and otherwise be injurious to a party, represented to be charged with liability by judgment, does not necessarily require the conclusion, as matter of law, that the publication was in itself defamatory. But in such case the party would be entitled to his remedy, supported by special damages alleged as the consequence of the false publication. The recovery of a judgment does not necessarily import conceded default in payment of a debt. It is a matter of frequent observation that controversies, arising apparently out of an honest difference of opinion, go into the courts for determination. Litigation also not unfrequently comes from causes in which is involved no personal credit or default. There is nothing in the defendant's report to indicate that the judgment was produced by any cause prejudicial to the credit of the plaintiff, and there is no presumption in that respect upon the subject in aid of the action. There was nothing for the consideration of the jury bearing upon the question whether the publication was libelous, and we think the trial court properly held, as matter of law, that it was not such *per se*. The plaintiff, therefore, was not entitled to recover general damages; and, as no special damages were alleged, there was no question for the jury upon that subject."

Among the more prominent cases relied on by appellant is *Meutze v. Tuteur*, 77 Wis. 236, 46 N. W. 123, 20 Am. St. 115, 9 L. R. A. 86; *State v. Armstrong*, 106 Mo. 395, 16 S.

W. 604, 13 L. R. A. 419; *Sunderlin v. Bradstreet*, 46 N. Y. 188, 7 Am. Rep. 322, and *Woodhouse v. Powles*, 43 Wash. 617, 86 Pac. 1063, 117 Am. St. 1079, 8 L. R. A. (N. S.) 783. The two cases first referred to were cases where, under any known rule of law, the libels were actionable *per se*. The plaintiff in the one case, and the prosecuting witness in the other, had been made the victims of so-called bad debt collection agencies. The effort to blackmail was apparent. The envelopes in which their coercive demands were transmitted contained matter which the courts justly held actionable because of implied malice; their transmission through the mail, and coming thus under the eye of the public, being a sufficient publication to warrant a recovery. We find no like element in this case. In *Sunderlin v. Bradstreet* the court held that a publication, such as the one before us is alleged to be, was not privileged; and the *Woodhouse* case does not cover the question whether it is necessary to plead special damages in a case of this kind. It does, however, hold that a report that a party was delinquent when in fact he was not so, is not libelous *per se*. To this extent it bears us out in our present conclusion. Considering the whole case and the authorities cited by appellant, we are unable to say, as a matter of law, that the publication in this case was made for the purpose of extorting money or to coerce the payment of a disputed debt, so as to bring this case within the cases relied upon.

We do not want to be understood as holding that an association of this character can claim a report of this or any other kind to be privileged. Mercantile agencies are not above the law, and must answer for their conduct; but when charged as for a libel it must appear, when the words relied on are not actionable *per se*, that some pecuniary loss has been sustained. When a loss of credit and business is charged, the names of the parties who have refused credit or withdrawn their custom must be set out specifically, or a state of facts alleged showing this to be impossible. If the words are

not actionable *per se*, a direct traceable loss must be alleged. Otherwise the complaint is bad on demurrer.

This conclusion makes it unnecessary to discuss other questions raised in the briefs of counsel. Judgment is affirmed.

RUDKIN, C. J., GOSE, FULLERTON, and MORRIS, JJ., concur.

[No. 8290. Department One. October 25, 1909.]

ROBERT SCOTT, *Respondent*, v. A. H. FARNAM *et al.*, *Appellants*.[1]

VENDOR AND PURCHASER—MORTGAGE BY VENDEE—RIGHTS OF MORTGAGEE AGAINST VENDOR—RESCISSION—PAYMENTS—RECOVERY. Where a vendor, after accepting a final payment made by the vendee's mortgagee to protect his lien, secured a cancellation of the sale and a deed from the vendee, and resold the property after redeeming the mortgage, his personal liability to the mortgagee for the payment made on the purchase price depends upon whether the resale was made to a *bona fide* purchaser for value, and if so, the price received on the resale is immaterial.

VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE—RECORDS—BURDEN OF PROOF. The burden of proving actual notice of an unrecorded conditional bill of sale, or of a claim not of record, is upon the party asserting the priority of the sale or claim.

MORTGAGES—PROPERTY SUBJECT—MORTGAGE BY PURCHASER IN POSSESSION—EFFECT. The interest of a purchaser in possession is subject to mortgage, and a mortgage operates as an equitable assignment of the interest, which precludes a rescission without giving the mortgagee opportunity to perform.

VENDOR AND PURCHASER—MORTGAGE BY VENDEE—RIGHTS OF MORTGAGEE AGAINST VENDOR. Where a vendee in possession mortgaged the property before full payment, and the mortgagee foreclosed, and in order to protect his lien, made final payment of the purchase price, the vendee being unable to do so, the vendor, who accepted the payment, is personally liable to the mortgagee for the amount of the same, where it appears that with notice of the final payment, he secured a rescission of the sale and a deed from the vendee, redeemed the property from the mortgage, and resold the property to an innocent purchaser for value, thereby cutting off the mort-

[1]Reported in 104 Pac. 639.

gagee's equitable lien for the purchase price paid; since the vendee's mortgage was an equitable assignment of the vendee's interest, giving the mortgagee the right to complete the purchase and precluding a rescission thereof without the mortgagee's consent.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 29, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action by a mortgagee to recover money deposited to protect a mortgage lien. Affirmed.

J. C. Cross (*A. Emerson Cross*, of counsel), for appellants.
John C. Hogan, for respondent.

Gose, J.—The respondent, the plaintiff below, commenced this action to recover the sum of $825 and interest. The case was tried to the court, and from a judgment in his favor for the amount claimed, the appeal was taken.

The cause of action arose out of the following facts: On January 26, 1907, the appellants, being the owners of certain real estate in the city of Aberdeen, entered into a contract with one Mary J. Carothers, whereby they agreed to sell, and she agreed to buy, the property for a consideration of $1,500, $750 thereof being paid at the time the contract was made, and the remaining $750, with $75 interest, was to be paid on the 26th day of January, 1908, at the bank of Hayes & Hayes, at Aberdeen, time being made the essence of the contract. Miss Carothers, upon the execution of the contract, went into possession of the property. The contract was filed for record May 29, 1907. On March 27, 1907, the appellants entered into a conditional sale contract with Miss Carothers, whereby, in consideration of $50 then paid and upon the payment of $850 principal and $71.60 interest, on January 29, 1908, they agreed to convey to her a two-story frame building then located upon property other than that they had contracted to convey, the same to be moved within twenty days from the date of the contract. This was

never paid. In April, 1907, Miss Carothers caused the building to be placed upon the premises the appellants had agreed to convey to her. On May 25 following, she executed a mortgage to the respondent upon the land contracted for, in the sum of $1,000. After the contract to convey the land was made and before the execution of the mortgage, she caused certain plumbing to be done upon the building on the premises, and failing to pay for the work, a lien was filed against the property. The lienors, after the execution of the mortgage to the respondent, put the claim into a judgment, and thereafter assigned it to the respondent. Thereafter the respondent foreclosed his mortgage, together with the assigned lien, and a decree was entered thereon on January 13, 1908. On January 23, 1908, the respondent, in order to protect the mortgage and judgment lien, deposited to the credit of the appellants at the bank of Hayes & Hayes, where the money was payable on the land contract, the sum of $825, the balance due thereon.

It is conceded that Miss Carothers was not financially able to make the payment. When the deposit was made, the bank held a properly executed deed in favor of Miss Carothers, embracing the land the appellants had agreed to convey to her, and it also held a bill of sale which purported to convey the building to her. On January 30 following, the appellants, having notice of the deposit of the balance due on the land contract, procured from Miss Carothers a written acknowledgment of the forfeiture of both the land and house contracts. On February 13 next, the appellants withdrew the deposit, and later the same day procured Miss Carothers to execute and deliver to them a deed of general warranty to the land, and thereafter and on the same day paid to the sheriff, who had advertised the property for sale on February 15, on an order of sale issued upon the decree of foreclosure, the $825 deposited by the respondent, and $600 additional, and redeemed the premises therefrom. On February 18 the respondent accepted the $1,400 and satisfied his judgment.

On October 27 following, the appellants, by a deed of general warranty, conveyed the premises to one Falconer, who filed it for record on that date. The deed to the appellants was filed for record on the day of its execution. The land contract, as we have seen, was filed for record in due time, but the contract for the sale of the building was not filed until in November, 1908.

Numerous errors are assigned, based upon certain findings of fact and the refusal of the court to find certain facts proposed by the appellants, but they all hinge upon the one main question, viz., whether there is a liability upon the facts stated.

The court, over the objection of the appellants, admitted in evidence the deed from them to Falconer, and permitted the latter to testify to the consideration he paid for the property. This is assigned as error. From the view we take of the case, the evidence as to the price paid for the property was immaterial; but proof of the conveyance of the property by the appellants to a *bona fide* purchaser for value was a prerequisite to a right to maintain an action for a money judgment against the appellants.

It is next urged that the court erred in finding that, when the respondent took the mortgage, he had no notice of the conditional sale building contract upon which the vendee was then in default, and it is argued that there is no evidence in the record to support the finding. As we have seen, the contract was not filed for record until November, 1907. The burden of showing that the respondent had actual notice of it was, therefore, upon the appellants, and we have found nothing in the record tending to prove it. Our code, Bal. Code, § 4585 (P. C. § 6547), as amended by Laws 1903, page 6, provides that conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute as to incumbrancers and subsequent creditors in good faith, unless within ten days after the taking of possession by the vendee, a memorandum of the sale, stating its

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The court, over the objection of the appellants, admitted in evidence the deed from them to Falconer, and permitted the latter to testify to the consideration he paid for the property. This is assigned as error. From the view we take of the case, the evidence as to the price paid for the property was immaterial; but proof of the conveyance of the property by the appellants to a *bona fide* purchaser for value was a prerequisite to a right to maintain an action for a money judgment against the appellants.

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terms and conditions and signed by the vendor and the vendee, shall be filed for record in the auditor's office of the county wherein the vendee resides at the date he takes possession of the property. It follows that the respondent had neither actual nor constructive notice of the contract.

It is next urged that the court erred in finding that Falconer was a *bona fide* purchaser for value, and that there was no evidence to support it. The burden of proving that he had actual notice of a claim not of record was upon the appellants, and we have found nothing in the record which even tends to prove such notice.

Passing to a consideration of the principal question, we find that it is well settled, that a vendee in possession of property under a contract of sale has an interest which can be conveyed or mortgaged; that a mortgage by the vendee operates as an equitable assignment of his interest in the property; that when the vendee has mortgaged the property and the vendor has notice of that fact, he cannot enter into a new contract for a rescission without the consent of the mortgagee or giving him an opportunity to perform the contract; that the mortgagee of the vendee in virtue of his mortgage acquires the right to complete the purchase if the mortgagor fails or refuses to do so; that the recording of the mortgage is notice to any subsequent purchaser from the vendor of the mortgagee's right to purchase the property under the contract if the vendee does not perform the conditions of the contract. 1 Jones, Mortgages (6th ed.), § 172; 27 Cyc. pp. 1037, 1038, 1139, 1486; *Smith v. Northern Pac. R. Co.*, 22 Wash. 500, 61 Pac. 255; *Brummett v. Campbell*, 32 Wash. 358, 73 Pac. 403; *Shaw v. Benesh*, 37 Wash. 457, 79 Pac. 1007. The appellants had actual notice of the respondent's mortgage.

To recapitulate: The record shows that a contract for the sale of the land was entered into; that the vendee went into possession and incurred an obligation which became a lien upon the property; that she then mortgaged the property

to the respondent; that he purchased the lien and, in default of payment, foreclosed the mortgage and the lien; that a judgment and decree of foreclosure was entered in his favor for about $1,400; that the contract of sale made time the essence of the contract, and provided for a forfeiture in default of payment; that three days before the maturity of the last payment, the vendee being unable to pay, he deposited $825 to the credit of the appellants, at the place where the money was payable, to protect his lien; that the appellants, with notice thereof, accepted the money, took a deed from the vendee, and caused it to be recorded, redeemed from the decree, and then sold and conveyed the property to a *bona fide* purchaser for value.

The law would indeed be impotent if it could not afford a remedy in such a case. When the appellants accepted the $825, they knew that it had been paid or deposited by the respondent for the protection of his lien. When they accepted a conveyance from the vendee and redeemed, they knew that the property was subject to an equitable lien in favor of the respondent for the amount deposited, or that in equity he could compel them to convey to him. The full purchase price had been paid. True, the appellants were not parties to the foreclosure suit, and there was no contract liability upon them to pay the judgment; nor was there any contract liability upon them to repay the $825. However, when they conveyed to an innocent purchaser, they conveyed that which in equity either belonged to the respondent or was subject to a lien in his favor for $825. They received as a consideration for the sale and conveyance of the property about $3,500. Upon the plainest principles of equity, $825 of this amount was the property of the respondent, and they became liable to him to that extent. Whether it be treated as an action for money had and received, or as one for an equitable conversion of a security, the result will be the same. When the final payment was made upon the contract and the appellants took a deed from Miss Carothers, they held the title in trust

for the respondent, at least to the extent of his equitable lien for the money he had paid to prevent a forfeiture. The sale of the property to an innocent purchaser prevented the respondent from enforcing his lien, but it does not follow that the appellants, the beneficiaries of the wrong done him, are exempt from liability.

Finally, it is urged that, having applied the identical $825 to a redemption from the claim, the respondent has been paid. This position is not tenable, for the reasons we have stated.

There was no error in the judgment, and it will be affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and MORRIS, JJ., concur.

[No. 8142. Department One. October 26, 1909.]

THOMAS GABRIELSON, *Respondent*, v. HAGUE BOX & LUMBER COMPANY, *Appellant*.[1]

LOGS AND LOGGING—CONTRACTS—CONSTRUCTION. In the absence of positive testimony or proof of custom, one who contracts to remove and deliver timber is presumed to supply all necessary means and appliances, and cannot recover on a *quantum meruit* for building a logging road to facilitate his operations.

PLEADINGS—SEPARATE COUNTS—REPETITION. It is inconsistent with the spirit of the code to permit a person who has but one cause of action to allege, as distinct causes, one upon contract and another upon *quantum meruit*, as permitted at common law to avoid a variance; but he must state one cause in concise language without repetition.

ELECTION OF REMEDIES—CONTRACTS—BREACH. Upon breach of a contract whereby plaintiff was prevented from completing performance, he may elect to sue on the contract for partial performance and loss of profits, or waive the contract and recover upon *quantum meruit*, but he cannot pursue both remedies.

TRIAL—INSTRUCTIONS—ISSUES AND PROOF—SUBMISSION—ELECTION OF REMEDIES. Where plaintiff alleged in distinct counts, one cause of action for breach of contract and loss of profits, and another on

[1]Reported in 104 Pac. 635.

quantum meruit covering the same subject-matter, it is error to submit the latter issue to the jury where there was no evidence to warrant it; and is prejudicial, requiring a reversal (although no election was demanded), where it cannot be determined whether the verdict was based upon the true or false issue.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered March 15, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Reversed.

Frank D. Nash, for appellant.

Loveday, Kelley & McMillan, for respondent.

CHADWICK, J.—This action in its original form was an action upon a *quantum meruit*, to recover a balance of $965.14 alleged to be due for work and labor performed at the special instance and request of defendant. The complaint was thereafter amended, setting up an express contract, its breach, and damages in the sum of $3,942.85; and a second cause of action upon a *quantum meruit*, being the cause of action first assigned, except that a balance of $1,385.14 was claimed to be due. This complaint was stricken by the court, and plaintiff thereupon filed a second amended complaint, alleging that plaintiff and defendant had entered into an oral contract for the removal of the timber on a certain forty-acre tract of land; that he was to receive the sum of $6.25 per thousand for the logs delivered in the boom; that he was to be paid when each 50,000 feet was delivered; that he had performed his contract until compelled to abandon it because of the neglect and refusal of defendant to pay him in the manner stipulated; that he had delivered 351,428 feet, and that 80,000 feet of logs remained in the timber, upon which he would have made a profit of $2 per thousand; that there remained uncut about 1,600,000 feet, upon which he would have made a profit of $2,500. Against these amounts he admits a set-off for the use of a donkey

engine. Under this cause of action, he claims damages aggregating $3,942.85.

For a second cause of action he alleges that he performed services, work, and labor for defendant at its special instance and request, of the reasonable value of $3,968.45; admits the payment of $2,074.80, and claims a balance due of $1,893.68. A bill of particulars in support of this cause of action shows that it covers practically the same subject-matter as is alleged in the first cause of action.

The answer, after admitting that a contract was entered into for logs to be delivered at the rate of $6.25 per thousand, and alleging that at least 15,000 feet was to be delivered each day until completion of the contract, and that payment was to be made once a month, is in effect a general denial. It was, however, admitted that 259,118 feet of logs had been delivered, and counter demands for goods and money advanced and the use of the donkey engine were set up. It is claimed that plaintiff was entitled to a credit in the sum of $1,621.46, from which should be deducted the sum of $2,311.74 for money and goods, leaving a balance due defendant of $690.28. In both causes of action the plaintiff undertakes to recover the sum of $1,157, which amount he alleges to be the value of labor performed in constructing a logging road in aid of his enterprise. The second amended complaint was filed over the objection of defendant. The case went to trial upon these issues.

There is no preponderance of evidence to show that plaintiff was to be paid as each 50,000 feet of logs was delivered. Neither is there a preponderance of the testimony to sustain a recovery upon a *quantum meruit*, either for the logging operations or for building the logging road. The contract as testified to is silent on that subject, and, in the absence of positive testimony or proof of custom, a court must presume that one who contracts to remove timber and deliver it in the stream will supply all means and appliances necessary to prosecute the work, and that it is covered by the contract

price. These questions would more properly be for the jury, if submitted upon issues properly framed, and would not be considered by us but for the reasons to which we shall presently advert. It is the privilege of a party to have his cause submitted to a jury upon a distinct issue. It is the duty of the court to exercise its judgment and see to it, although the pleadings had tendered an unwarranted issue, that an issue unsustained is not left to the jury for its consideration. To prevent situations such as we have here is one of the purposes underlying the reformed methods of pleading. A person can have but one cause of action arising out of the same subject-matter, and this he must state in plain and concise language and without repetition.

"Since the reformed pleading requires the facts to be averred as they actually took place, it does not in general permit a single cause of action to be set forth in two or more different forms or counts, as was the familiar practice at the common law. The rule is undoubtedly settled, that, under all ordinary circumstances, the plaintiff who has but one cause of action will not be suffered to spread it upon the record in differing shapes and modes, as though he possessed two or more distinct demands; and when he does so without special and sufficient reason, he will be compelled, either by a motion before the trial or by an application and direction at the trial, to select one of these counts, and to abandon the others." Pomeroy's Code Remedies (3d ed.), § 576.

The method of pleading employed in this case, though favored under the old practice in order to avoid the consequences of a variance between the pleadings and proof, finds no favor under our present statutes, and is inconsistent with their spirit. *Muzzy v. Ledlie*, 23 Wis. 445. While this defect made the pleading subject to motion, and in a proper case would be deemed to be waived by the opposite party, it cannot be so held here. The testimony shows that respondent's original cause of action, if any, was upon the contract. There was nothing, in our judgment, warranting the submission of the question of the reasonable value of plaintiff's

labor and services to the jury, except possibly in the sum of $115. When a contract, such as the one before us, is entered into and is breached by one of the parties, the other party may either sue upon his contract and recover on the contract in so far as it is performed, as well as the value of his bargain in so far as it is unperformed, provided he can show a loss of profits, or he may, because of such breach, waive the contract and sue as upon a *quantum meruit*, and recover the value of his labor or services. *Noyes v. Pugin*, 2 Wash. 653, 27 Pac. 548; *Chase v. Smith*, 35 Wash. 631, 77 Pac. 1069. He cannot pursue both remedies, for they bear a different measure of damage. The court, however, not only did not withdraw the second cause of action from the jury in so far as the logs and the logging road were concerned, but left it to the jury to determine whether one or both causes of action were before them, and upon this to fix the amount of recovery. It was left to the jury to determine the issue as well as the fact.

If it were possible to pass these things unnoticed we would do so, but the case as it comes to us makes it impossible to say that the jury rejected the false and rendered its verdict upon the true issue. It may have rejected the element of damages and based its verdict on the value of the logging road, or it may have allowed damages for a breach of the contract and lost profits and also a sum to cover the cost of the logging road on the *quantum meruit*, which would under the evidence have resulted in a double recovery. *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200.

Finding no way to sustain the judgment upon any assurance that a just verdict was rendered, this case will be reversed and remanded for a new trial, with directions to the lower court to compel an election of remedies on the part of plaintiff.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8403. Department One. October 26, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Wesley Lloyd, Plaintiff*, v. THE SUPERIOR COURT FOR KING COUNTY, *Respondent*.[1]

HUSBAND AND WIFE—SEPARATE MAINTENANCE—ACTION—RESIDENCE OF PLAINTIFF. Bal. Code, § 5718, requiring residence for one year in this state by the plaintiff in an action for divorce, has no application to actions for separate maintenance.

SAME—ALIMONY IN SEPARATE MAINTENANCE—SUIT MONEY—DENIAL OF MARRIAGE. An order for alimony *pendente lite* and suit money cannot be made, independently of statutory provisions, in an action brought for separate maintenance, where the fact of marriage is denied and the defendant alleges inability to pay.

Certiorari to review an order of the superior court for King county, Main, J., entered September 29, 1909, directing the payment of suit money and alimony pending an action for separate maintenance. Reversed.

Wesley Lloyd and *A. H. Garretson*, for relator.

Hastings & Stedman, for respondent.

CHADWICK, J.—A writ of certiorari directed to the superior court of King county brings to us for review an interlocutory order entered in the case of Ida L. George v. Charles E. George, now pending in King county. The trial court directed the payment of the sum of $100 suit money, and $75 per month as alimony or maintenance pending the final hearing.

The principal action is one for separate maintenance. A divorce is not sought, and it is the contention of the relator that the court had no jurisdiction to enter the order complained of. This he argues under two principal assignments, the first being that, if an action for maintenance be an incident to, and covered by, the statutes pertaining to divorce

[1]Reported in 104 Pac. 771.

proceedings and alimony, the jurisdiction of the court depends upon the fact of plaintiff's residence within the state for one year; that the plaintiff not having acquired a residence in the state of Washington, the court acted in excess of its jurisdiction, and the order is for that reason void; second, that the court cannot, without exceeding its jurisdiction, make an order granting alimony or suit money *pendente lite* in an action for separate maintenance; that if such power exists it must depend upon the warrant of an express statute, or it must result as an incident to its plenary power when in the exercise of its equitable jurisdiction; that it will then be sustained only because equity will not know a wrong without a remedy; that if there is an adequate remedy at law the jurisdiction of equity will not attach; that chapter 103, Laws 1907 (the desertion and nonsupport law), does furnish an adequate remedy, and for that reason the court exceeded its jurisdiction.

The point—and as it seems to us the principal point—is made that a court could not make an order for maintenance and attorney's fees *pendente lite* when the fact of marriage is denied. Respondent relies upon the following cases decided by this court: *Kimble v. Kimble*, 17 Wash. 75, 49 Pac. 216; *Branscheid v. Branscheid*, 27 Wash. 368, 67 Pac. 812, and *Ex parte Winter*, 70 Cal. 291, 11 Pac. 630. The first two cases are familiar to the bar of this state and need not be discussed, except to say that they go no further than to hold that courts have jurisdiction to decree an allowance for the permanent support and maintenance of a wife upon a proper showing of the necessity of the wife and the ability of the husband to pay, or that the parties are possessed of community property which in justice should be turned to the support of both husband and wife. The *Winter* case is sustained by reference to statutes of the state of California (Civil Code, § 137), wherein it is expressly provided that a wife may begin an action for permanent support, and that the court may make an order pending the action for suit

money and alimony. "It was not disputed in any quarter that the plaintiff was the wife of Winter." *Winter v. Superior Court*, 70 Cal. 295, 11 Pac. 633. The action for maintenance being, under the decisions of this court, an ordinary action in equity and independent of the divorce statutes, it follows that the requirement of the law (Bal. Code, § 5718; P. C. § 4632), a residence of one year on the part of one seeking a divorce, cannot apply. It has been frequently so held. The court was not without jurisdiction in that respect. *Hulett v. Hulett*, 80 Ky. 364; *Tolman v. Tolman*, 1 App. D. C. 299; *Shrader v. Shrader*, 36 Fla. 502; *Miller v. Miller*, 33 Fla. 453, 24 L. R. A. 137.

We shall content ourselves with discussing the one question whether the court, in justice to the parties, ought to make an order *pendente lite* when the fact of marriage is denied. Orders requiring the payment of money pending any form of action are not favored, and should never be granted by the court unless warranted by the statute or sustained by some recognized and well-settled principle of equity. Whether a court has inherent power to make an order for alimony pending an action for maintenance, irrespective of the statute, is one upon which the cases are divided (25 Cyc. 1604), and we do not feel called upon to decide it in this action. When the fact of marriage is denied, the fact upon which the one and ultimate recovery must depend is put in issue, and it would seem that the court would have no right to anticipate the final decree and order an award of alimony upon an interlocutory proceeding. The case being independent of the divorce statutes, the court cannot, upon such denial, give to the one party or take from another upon the theory that the alleged husband has property which ought, in conscience, to be put to the uses of the one asserting herself to be a wife, or which belongs to a community composed of the two, or that the husband owes a duty of support which has been denied. The parties stand before the court, not as husband and wife, but as any other litigants contesting a

case calling for a money judgment. We find no cases directly in point, although it has been held in divorce cases and statutory proceedings where the power of the court was undoubted, that an order *pendente lite* should not be made where the fact of marriage is denied. The logic which sustains these cases will sustain our conclusion in this case.

In *Hite v. Hite*, 124 Cal. 389, 57 Pac. 227, 71 Am. St. 82, 45 L. R. A. 793, the court said:

"If the marriage were admitted, then, upon a showing of the wife's necessities and the faculties of the husband the allowance is almost a matter of course. It is otherwise when the marriage is denied. Then, before alimony can be allowed, the marriage must be proved, and a prima facie showing made by the wife when there is a counter showing is not sufficient. The judge should be satisfied from the entire proof made of the fact of marriage. Unless upon that question the husband has had his day in court and a hearing, if alimony is allowed, his property is taken without due process of law. This precise question has not been considered, or even suggested, in any case to which my attention has been called, except in *McKenna v. McKenna*, 70 Ill. App. 340. It was there said that in such case—when the marriage is denied—the order cannot properly be made 'until a hearing has been had and the court upon it finds that the relation of wife and husband exists.' The hardships which might result from either doctrine is there very tersely stated. The learned judge quotes from *Schonwald v. Schonwald*, 1 Phill. Eq. 219, to the effect that it is better when a woman makes oath of the fact of marriage to make an allowance, although the oath may turn out to be false, than that a wife may be in danger of starvation 'if a brutal husband makes oath denying the marriage, which may turn out to be false.' To which the Illinois judge replies that 'the more accurate statement would be that it is better to compel any man to pay temporary alimony and expenses of suit to any woman who may see fit to make oath that he is her husband, however strongly he may deny the allegation, rather than allow her to be in want of money which he has.' Whatever hardships may result, the court cannot lawfully take by final decree money from A and give it to B, whatever may be the necessities of B, when A

disputes the facts upon which his liability is made to depend, without a trial and a determination of the issues made."

In *Vreeland v. Vreeland*, 18 N. J. Eq. 43, the chancellor met the proposition now before us for consideration in the following way:

"Where the real controversy in the suit is, as here, between the parties, whether that relation exists, or ever did exist, the order cannot be made upon the mere allegation or *ex parte* affidavits of the wife. Else every man might be made to pay the expenses of any woman who claimed him as her husband, and sues him for maintenance, and to support her as long as the suit could be spun out."

See, also, *Freeman v. Freeman*, 49 N. J. Eq. 102; *York v. York*, 34 Iowa 530; *Collins v. Collins*, 71 N. Y. 269.

A case most nearly in point is that of *Therkelson v. Therkelsen*, 35 Ore. 75, 54 Pac. 885, 57 Pac. 373. This was an action brought under a statute allowing a separate action for maintenance, and authorizing an order "after hearing the parties." It was held that an allowance could not be made for support and counsel fees *pendente lite*. In discussing the remedy and the rights of the parties, the court said:

"It [the order for suit money] is not incidental, as in a suit for divorce, where the purpose is to enable the wife to litigate with her husband, but final as the sole and ultimate redress to be administered."

Alimony or maintenance and counsel fees is not granted as a matter of course (*Pringle v. Pringle, ante* p. 93, 104 Pac. 135), or upon the mere allegation of marriage. Neither is the order imposed as a penalty, but to compel the performance of a duty, and must be sustained on equitable grounds, having reference to the relative situation of the parties. Here, where plaintiff submits a purported marriage certificate, identified by one who says that he is familiar with the handwriting of the officiating clergyman, she is met by a denial of the marriage and of the financial ability of the defendant to pay, as well as the allegation that plaintiff

has funds in her own right as well as interest-bearing stocks of considerable value. These are the issues made by the pleadings, and they call for a formal trial. If the rules which we have quoted apply under statutes and in divorce cases, surely it cannot be contended that a court, acting independently of the statute and in the exercise of its general equitable powers, should grant an order over the denial of the defendant that he is the husband of plaintiff, coupled with his assertion of pecuniary inability to pay, until a full, final and complete hearing on the merits. To so hold would make it possible to try every case of this character upon an interlocutory proceeding, or subject the defendant to an invasion of property rights for which he might be without redress although the final decree be entered in his favor.

The order of the trial court is reversed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8179. Department Two. October 27, 1909.]

W. H. PALMER *et al.*, *Appellants*, v. ALICE GRAHAM ABRAHAMS, *Respondent*.[1]

TRUSTS—DEED IN TRUST—EVIDENCE TO ESTABLISH—SUFFICIENCY. In an action to quiet title, the evidence is insufficient to show that an absolute deed made by a husband and wife was in trust, where the wife's testimony to that effect was contradicted by her husband, who testified that he negotiated the sale and that the deed was made upon full consideration.

HUSBAND AND WIFE—COMMUNITY OR SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY. It sufficiently appears that property sold by a husband and wife, and later conveyed to the husband, became his separate property, where the wife produced no evidence to contradict the husband's statement that he paid for it out of his separate estate, and from her testimony the conveyance would appear to have been without consideration and a gift to the husband.

[1]Reported in 104 Pac. 648.

GUARDIAN AND WARD—SALE OF REAL ESTATE—POWER OF GUARDIAN. A guardian's deed of real estate without any order of court is a nullity.

QUIETING TITLE—EJECTMENT—IMPROVEMENTS—VALUE—EVIDENCE—SUFFICIENCY. A finding that the value of improvements on real property is $400 is contrary to the evidence, where the only testimony on the subject was the affidavits of two witnesses fixing the value at $700 and $1,300, respectively.

QUIETING TITLE — EJECTMENT—IMPROVEMENTS—JUDGMENT—FORM. In an action to quiet title, in which the court finds the title in the defendant subject to the value of plaintiff's improvements, the judgment is bad in form where it permits the plaintiffs to remain in possession until their lien for improvements is paid; and the judgment must establish the rights of the parties in conformity with Laws 1903, p. 262.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 12, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to quiet title. Modified.

F. E. Knowles, for appellants.

RUDKIN, C. J.—The present controversy arose over the title to Lots 4 and 5, of Block 1, of Dodge's Division of Green Lake Addition to the city of Seattle. The respective parties deraign their title as follows: September 12, 1890, Z. U. Dodge and wife conveyed to Minnie J. Wood. August 8, 1895, Phil Abrahams and Minnie J. Abrahams (formerly Minnie J. Wood) conveyed to Robert M. Eames. December 27, 1895, Eames and wife conveyed to Patrick C. Portley. August 29, 1896, Portley and wife reconveyed to Phil Abrahams. May 12, 1897, Phil Abrahams conveyed to the defendant Alice Graham Abrahams. December 17, 1903, Minnie J. Abrahams, signing herself as guardian for Alice G. Abrahams, conveyed to Charles C. Spencer. December 10, 1904, Spencer and wife conveyed to the plaintiff W. H. Palmer. June 29, 1907, Minnie J. Abrahams and Phil Abrahams, by Minnie J. Abrahams his attorney in fact, conveyed

to the plaintiff W. H. Palmer. Phil Abrahams and Minnie J. Abrahams intermarried July 31, 1892, were divorced March 8, 1897, and the defendant is their daughter.

The court below found that the title was in the defendant, subject to a lien of $400.64 in favor of the plaintiffs, quieted title in the defendant subject to the plaintiffs' lien, and adjudged "that the plaintiffs surrender possession of said real property to the said Alice Graham Abrahams, upon the payment of their said lien, and that said plaintiffs remain in possession until their lien for the permanent improvements placed upon said realty, and for the taxes paid on said realty for the year 1904, to wit the sum of $400.64 is paid." From this judgment the plaintiffs have appealed.

The theory of the appellants, as advanced in their complaint, was that the property was originally the separate property of Minnie J. Abrahams; that she and her husband conveyed the property to Eames in trust to secure an indebtedness of $200 to Portley; that Eames and wife conveyed to Portley, Portley and wife to Phil Abrahams, and Phil Abrahams to the respondent, and that the property is still impressed with a trust in favor of Minnie J. Abrahams and her grantees. The only testimony offered in support of this claim is that of Minnie J. Abrahams, taken by deposition, in which she says:

"I know the transaction about that deed to Robert M. Eames. Said deed was made to Robert M. Eames to hold the same in trust for me to keep creditors from selling same, as said Abrahams owed doctor bills and claims in Seattle. I ordered said R. M. Eames to deed said property to Patrick C. Portley in trust for me which he did, and said Portley held said property in trust for me, and I received no consideration whatever for said deeds."

Opposed to this is the testimony of Phil Abrahams, taken by deposition, in which he says:

"I remember the deeding of these lots to Robert M. Eames, in 1895. The deed was an absolute deed for the conveyance of title to these two lots and other property of my own

described in that deed. Neither Mrs. Abrahams, nor I ever borrowed any money from Eames or Portley, and it was not intended or understood by Robert M. Eames, Mrs. Abrahams, and myself to be anything else than an absolute deed for all the real property described in the deed, Mr. Portley had nothing to do with this transaction.

"I know what the intentions of the parties to the transaction were from the fact that I had discussed with Mrs. Abrahams, the advisability of selling some of my property in South Park, and other places, and she expressed her desire to sell her two lots at Green Lake, also, I negotiated the sale, and was a party to the transaction, and know that it was negotiated and consummated as an absolute sale of all the property described in that deed and that there was never a word in regard to any one intending it to be anything but an absolute deed.

"Patrick C. Portley had no connection with nor interest whatever in this transaction between Eames, Mrs. Abrahams, and myself. It was simply a sale of this property to Eames and no third person was interested or involved in this transaction in any way whatever.

"This deed to Eames was signed by Mrs. Abrahams, as my attorney in fact, I gave Mrs. Abrahams a power of attorney as a matter of convenience for making transfers of property, my principal reasons were reasons of a domestic nature rather than of a business nature as she wanted the money. I told her myself to sell after I had negotiated the sale with Eames, and I do not remember of ever receiving a cent of the consideration money.

"Minnie J. Abrahams received the money for all the property sold to Eames which includes Lots 4 and 5, Block 1, of Dodge's division of Green Lake addition, I never received nor wanted any money from her property.

"Neither of us had any interest whatever in the transaction between Eames and Portley, we had sold the property to Eames, and our interests in the property ended there."

There is little in the record to corroborate or contradict either witness, and we agree with the court below that the testimony on the part of the appellants is not sufficient to defeat the operation of the deed or impress the land with a trust in favor of the grantors or their successors. The

appellants further contend that, even though the original conveyance was absolute, the property was reconveyed to Phil Abrahams during the existence of the marriage relation between him and Minnie J. Abrahams, and therefore became community property. In this contention the appellants are supported by the legal presumption alone. Phil Abrahams testified that he paid for the property from separate funds owned by him long before his marriage, and Minnie J. Abrahams offered no explanation as to the source of the purchase money, if indeed she did not claim that the conveyance was without consideration, in which case it would perhaps be deemed a gift. Allegations made by Phil Abrahams in a complaint for divorce filed some years before tend to impeach his testimony, but on the whole we feel constrained to accept the finding of the court below, that upon the reconveyance, the property became the separate property of the husband, and the legal title is now vested in the respondent. The alleged guardian's deed was made without any order or authority from any court, and is of course a nullity.

The only remaining question in the case is the value of the permanent improvements which the court below found the appellants had made while holding in good faith, under color or claim of title, adversely to the claim of the respondent. All the testimony relating to this question is found in an *ex parte* affidavit of W. H. Palmer submitted by the appellants, and a similar affidavit of one Green submitted by the respondent, which the parties stipulated might be read and considered as evidence at the trial. The former affidavit placed the value of the lots without the improvements at $250 each, and the value of the improvements at $1,300. The latter placed the value of the lots at $250 each and the value of the improvements at $700. Under this testimony, and there is none other, the finding of the court that the improvements were of the value of $400 is manifestly contrary to the evidence. There is nothing in the record to guide us in fixing the value of the improvements, except the naked state-

ments of these two witnesses, but in this respect we are no more in the dark than was the court below. On the one hand the affidavit offered by the appellants was made by a party in interest who no doubt had in mind the original cost of the improvements rather than their present value, while, on the other hand, he made the improvements and doubtless had a more accurate knowledge of their extent and value than would a mere stranger. Under all the circumstances we think $1,000 is a fair value to place upon the improvements, and we therefore fix the value in that sum. The judgment of the court below was also erroneous in form. It left the appellants in possession of the property with a lien of $400, with no remedy for its enforcement except to retain possession or wage another lawsuit.

The judgment of the court below is reversed, with directions to enter judgment establishing the rights of the parties in accordance with the provisions of the act of March 19, 1903, Laws of 1903, p. 262. In entering judgment the court will accept the values fixed by this court; namely, $250 each for the lots without improvements, and $1,000 for the improvements.

DUNBAR, PARKER, CROW, and MOUNT, JJ., concur.

[No. 7391. Department One. October 27, 1909.]

J. D. SMITH, *Respondent*, v. HEWITT-LEA LUMBER COMPANY, *Appellant*.[1]

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by an oiler in a mill, caught by the automatic starting of a carriage, the evidence does not show, as a matter of law, that he was guilty of contributory negligence, or was loitering about as a volunteer, instead of in the performance of his duties, from the fact that, while he was on his way to oil machinery, he was momentarily interrupted by a sawyer who informed him that the machinery was stalled, and that he looked at the friction and advised the saw-

[1]Reported in 104 Pac. 651.

yer, where it further appears that, after a momentary interruption and show of interest that was natural under the circumstances, he was going on about his duty at the time he was injured.

SAME — CONTRIBUTORY NEGLIGENCE — PRESUMPTION OF RISKS — CHOICE OF WAYS. An oiler, on his way to oil machinery, is not guilty of contributory negligence and does not assume the risk, as a matter of law, in choosing a passageway between a carriage and skids, which was usually taken by employees, when he might have gone another way, where each way was in some degree hazardous, and no passageway had been specially provided by the employer.

SAME—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCE—MACHINERY IN COMMON USE—QUESTION FOR JURY. The negligence of the master in using a lever to start a carriage in a mill which was not provided with any guard, clutch, or contrivance to hold the lever stationary and prevent its falling and accidentally starting the carriage, is for the jury, notwithstanding testimony that the machine was as manufactured and advertised and in common use, where that evidence was disputed and there was other testimony that a simple, inexpensive guard in common use would reduce the danger of operation.

APPEAL—PRESERVATION OF GROUNDS—EXCEPTIONS. Error cannot be assigned upon the offering of incompetent evidence and improper conduct of counsel, where no exceptions are reserved, in the absence of a positive showing of prejudice or a verdict contrary to the clear preponderance of the evidence.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries for $6,375 is excessive, and should be reduced to $4,000, where it appears that the plaintiff, employed as an oiler, at $2.50 a day, 50 years of age, sustained an injury to the ankle, restricting its movement somewhat and causing pain, and requiring him to walk with a cane, that he was in the hospital two weeks and on crutches five months, and he was allowed to testify as to a much larger earning capacity in another employment in which he had not engaged for some time and did not expect to engage in (MORRIS, J., dissenting).

Appeal from a judgment of the superior court for King county, Gilliam, J., entered January 6, 1908, upon the verdict of a jury rendered in favor of the plaintiff for $6,375, for personal injuries sustained by an employee in a shingle mill. Affirmed on condition of remitting $2,375.

Peters & Powell, for appellant.

Roney & Loveless and *Walter Fulton*, for respondent.

CHADWICK, J.—Defendant owns and operates a shingle mill at Wilburton, in King county. Plaintiff was in the employ of defendant as oiler, a duty he had performed for a month or more prior to March 13, 1906, although he had been employed about the mill since December 24, 1905. A part of the mill equipment was a set of skids from which the cants were rolled onto a cut-off carriage, where they were cut into bolts for convenience in manufacturing. The cut-off carriage rested on wheels which ran over two rails. The play of the carriage was between four and five feet, so that when it was at its furthest limit from the skidway there was an open passage between it and the skids of that width. The carriage was controlled by a lever situated at the west end of the cut-off carriage. This lever operated an in and out friction clutch, and when moved in one way it gathered power to move the carriage toward the skids, and when moved the other way the carriage was impelled toward the saw. When the lever stood upright, the carriage was stationary, whatever its position might be on the track. There was no catch, clutch, guards, blocks, or counterweights to hold the lever in place when once set by the cut-off sawyer.

At the time of the accident, there was also employed as cut-off sawyer one Boies. On March 13, shortly after the machinery had been started after the dinner hour, plaintiff oiled the machinery on the lower floor of the mill, and ascended a stairway at the north end of the mill from whence he intended to go to the south end of the mill to oil the slasher saws. When he reached the upper floor, he found Boies near the stairway, and the cut-off carriage standing still. Boies told him that the friction clutch would not work, and that the machinery had stalled. Plaintiff looked at the friction, and then told Boies to try it again. This Boies says he started to do. His way lead between the carriage and the skids. At the time the carriage was so standing that there was a space of from twelve to fourteen inches through which he passed. Appellant followed him at a distance of four or

five feet. This was the usual and customary way of going from one end of the mill to the other, although they might have climbed the skids and cants, passed over the kneebolter's table, or gone around on the outside of the mill. Just as plaintiff was going between the carriage and the skids, and at a time when he was stepping over the timber on which the track was laid, the lever fell, from no apparent cause unless from the vibration of other machinery. The carriage started toward the skids, catching plaintiff, and injuring his foot and ankle so that he was permanently injured. He recovered a verdict in the sum of $6,375, and defendant has appealed.

Many assignments of error are made, but all of them raise the legal defenses of contributory negligence, assumption of risk, and one other which we shall discuss later. The record shows that the right of respondent to maintain his recovery depends upon two questions of fact which, if properly resolved by the jury, are decisive of the case. Appellant alleges the fact to be that respondent would not have been injured had he not negligently loitered in a place of apparent danger to examine the friction clutch. It seeks to hold him to the legal effect of the testimony of Boies, which it quotes as follows:

"Q. And he was trying to find out what was the matter with it at that time? A. He simply told me to try it again and see if he could see what was the trouble. Q. You were going up there to try the lever? A. Yes. Q. And he was going to find what was the matter with the machine? A. I think so. . . . Q. He looked at the friction wheel? A. Yes, I think he did notice it and started to walk around the carriage."

Admitting that this testimony, standing alone, would be enough to support the charge of contributory negligence, when taken in connection with other testimony of the same witness and the testimony of the respondent, it does not bear the construction put upon it by counsel for appellant. Respondent had testified that, after his interruption, he was pro-

ceeding in his usual way to the slasher saws, and that it was not his duty—as indeed it was not—to fix the clutch, and that he intended to tell the millwright if he saw him. There was sufficient to warrant the jury in finding that, after allowing the momentary interruption and show of interest and word of advice, which were natural under the circumstances and a thing which the average man would do, he was going on about his duty. The disputed fact was thus brought to the attention of the jury and was decided against the appellant.

Nor do we think the jury erred in finding against the appellant on the assumption of risk. The evidence is abundant to justify the finding that respondent was proceeding in the usual way, and but for the unexplained fall of the lever it would have been perfectly safe. When there is more than one way that the employee might have gone through the mill, each in some degree hazardous, but no passageway is provided especially by the employer, and the employee goes the way usually taken by the employees, the master is charged with notice of the fact, and the employee will not be charged under such circumstances with contributory negligence or assumption of risk. *Jackson v. Danaher Lumber Co.*, 53 Wash. 596, 102 Pac. 416.

There was also testimony to the effect that respondent did not know of the propensity of the lever to fall, and seeing it in an upright position, he had no reason to suspect that it would fall.

Neither can we hold, as a matter of law, as against the finding of the jury, that respondent had abandoned his duty as an oiler and become a volunteer in the performance of the duty of another, so that he would be barred of recovery. We find nothing in his testimony, or in the testimony of any other witness, that would warrant the conclusion that he was doing, or about to do, anything inconsistent with his duty.

Appellant introduced evidence tending to show that it was

not customary to guard the lever on machines, operated as this carriage was, with an in and out friction clutch; that the machine as advertised by firms making standard machines such as this one was had no contrivance to hold the lever in place; that having used the machinery that is in ordinary and common use in the line of business in which appellant was then engaged, it had discharged its full duty, and cannot be held liable for an accident that might have been prevented by the use of different machines. Upon this point the case of *Hoffman v. American Foundry Co.*, 18 Wash. 287, 51 Pac. 385, is cited. In that case the character of the machinery was not in issue. The court said:

"The evidence in this case shows—and the fact is not disputed— that machinery of the character under consideration . . . is in common use in foundries and in other like shops."

But here the question was submitted to the jury upon a clear conflict of the evidence. More than that, there was testimony going to show that, by the employment of one of several simple and inexpensive guards, the lever could have been secured so that there would have been no possibility of accident. In *Towle v. Stimson Mill Co.*, 33 Wash. 305, 74 Pac. 471, the machine started automatically, and, among the defenses urged, was one that the machine was of standard grade and such as was in general use and reasonably safe for the purposes intended. Yet a recovery was allowed to stand. The logic of that case is that the *Hoffman* case only applies where the fact is not disputed. In the case of *Crooker v. Pacific Lounge & Mattress Co.*, 29 Wash. 30, 69 Pac. 359, the court said:

"If there can be placed upon a machine a simple, inexpensive guard, in common use, which will obviously reduce the danger of its operation, such fact surely may be taken into consideration, in connection with the other facts, to determine whether the master in the particular instance has acted as an ordinarily prudent person would have done."

See, also, *Hencke v. Babcock*, 24 Wash. 556, 64 Pac. 755.

Counsel for appellant cites many cases, with one exception against railroad companies, where a recovery was denied to the plaintiff when it appeared that he had attempted to go between cars, depending on the cars remaining stationary. These cases do not seem to us to be in point. In all of them it is shown that the risk assumed is such as would have been shunned by a man of ordinary prudence. A chance was taken. But in the case at bar respondent knew that the moving of the carriage depended upon the lever. He had a right to assume that, so long as the lever stood upright, in plain sight, unattended, there would be no movement of the carriage. He had frequently passed that way, the carriage being held stationary for that purpose. This case falls rather within the rule of the *Crooker* case, where a recovery was allowed upon facts not at all dissimilar to the showing made in this case.

We have read the instructions of the court and find that, notwithstanding the refusal of the court to give a number of requested instructions, the issues were fairly stated and proper instructions given by the court. So that no prejudice resulted to the appellant on that account.

Other errors are assigned on an offer of testimony which it is alleged counsel for respondent knew to be incompetent, and upon misconduct of counsel, and a strong argument made to the effect that a party should not, under such circumstances, be put to the necessity of reserving an exception or asking the court to charge the jury to disabuse their minds of any impression made by the unwarranted offer or conduct. Whatever may be said in this behalf—and there is much—trials would never be ended if courts presume error from every unwarranted incident occurring at the trial. In the absence of a positive showing of prejudice, or a verdict contrary to a clear preponderance of the evidence, where exception is not reserved to the alleged misconduct, we must presume that the trial court has protected the interest of the

litigant by timely observation to the jury whenever it was necessary.

It is further contended that the verdict of the jury was excessive. Respondent was about fifty years of age when injured. He was in the hospital for two weeks, and was treated for a month or two thereafter; was on crutches until about August 1, following the accident; his ankle and foot were crushed so that, in healing, the joint is enlarged. He says he suffers some pain all the time, and is compelled to walk with a cane. The testimony of the physicians shows that the bones of his ankle are healed, but the injured ankle is from a half to three-quarters of an inch larger than the other. The ankle is not normal and will probably never be quite so. The sidewise motion of the foot is about normal, but the up and down motion at the instep is restricted. The consequences of the injury might have been overcome to a greater extent by a more vigorous treatment at the time, and might now be improved by a like treatment. Respondent has followed, to some extent, the trade of trunkmaker and carpenter, in which occupations he had earned from three to four dollars a day, although he had "farmed a good part" of his life. He had been a shareholder in the mill in which he was injured, prior to the time it was purchased by appellant. Following the accident, he again went to work for appellant, taking other employment at a wage of $2.50 per day, the same wages he had received before the accident. He kept this job about a month and a half, or until he quit it to bring this suit.

Damages in a case of this kind are to be adjusted on the theory of compensation rather than punishment, and when so considered the verdict should be reduced. The earning capacity of the claimant should be measured, not by what a man might earn in another employment, but by what he is earning when injured, unless it be shown that the present employment is temporary; otherwise damages would be speculative. So in this case, the jury must have assessed the damages upon the basis of a wage which respondent testified he was able to earn

in another employment, but one in which he was not engaged, nor was there any testimony to show that he expected or intended to engage in it. We believe the verdict was excessive on the theory that a loss of earning capacity was not sufficiently shown to warrant the amount returned, and that it should be reduced in the sum of $2,375. If respondent elects to accept the sum of $4,000 within ten days after the remittitur is filed, the case will be affirmed; otherwise a new trial is granted. Respondent will recover costs in this court.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

MORRIS, J. (dissenting)—I dissent. The amount of the verdict, considering the character and extent of the injury, especially in view of the testimony that the condition of respondent's ankle is largely due to his refusal to submit to proper treatment, is, to my mind, conclusive that the jury in determining their verdict, were influenced by some improper motive, and that the "excessive damages" found by the majority opinion shows the influence of passion or prejudice. For this reason the judgment should be reversed and a new trial ordered.

[No. 8303. Department Two. October 27, 1909.]

A. GRANT, *Plaintiff and Appellant*, v. JOHN D. ARMSTRONG, *Defendant and Appellant*, BELL FUEL COMPANY, *Respondent*.[1]

APPEAL—PRESERVATION OF GROUNDS—INSTRUCTIONS—REQUEST. Error cannot be assigned on the failure of instructions to cover the plaintiff's theory of the case, where no instructions were requested on the subjects regarding which complaint is made.

APPEAL—REVIEW—HARMLESS ERROR. Error in giving instructions is harmless where the evidence was insufficient to warrant a verdict for the appellant.

[1]Reported in 104 Pac. 632.

APPEAL—REVIEW—GRANT OF NEW TRIAL. An order granting a new trial, after nonsuit, must be affirmed if there was any evidence to sustain a verdict for the plaintiff.

NEGLIGENCE—DRIVER OF TEAM—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant a finding that the proximate cause of plaintiff's injuries was the negligence of the driver of a team that took fright at an automobile, where all of plaintiff's disinterested witnesses testified that he was holding his horses tightly and doing all he could to keep them under control, although one interested witness testified that he was driving with loose lines.

MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—AUTOMOBILES—PLEADING—PROXIMATE CAUSE. A complaint alleging that a team was frightened by the negligence of the driver of an automobile in blowing his whistle when directly opposite the team, while driving at a high rate of speed in violation of a city ordinance, in such a manner as to frighten the team, fairly includes the rate of excessive speed as a proximate cause of the accident.

SAME—USE OF STREETS—AUTOMOBILES—NEGLIGENT DRIVING—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the driving of an automobile, whereby a team was frightened and ran away, to require the case to be submitted to the jury, where it appears that the automobile was run at a speed of twenty or twenty-five miles an hour, on a street where there were many teams and where the city ordinances prohibited a speed in excess of ten miles an hour, that the driver passed within fifteen feet of the team, and blew his whistle when directly opposite, and did not notice the horses before they started to run.

Appeal by plaintiff from a judgment of the superior court for Pierce county, Shackleford, J., entered June 17, 1909, upon the verdict of a jury rendered in favor of the defendant Bell Fuel Company, in an action for personal injuries caused by a runaway team; also, appeal by defendant Armstrong from an order for a new trial as to him, after having been granted a nonsuit at the trial. Affirmed.

Govnor Teats, *Hugo Metzler*, and *Leo Teats*, for appellant Grant.

William P. Reynolds, *Robert M. Davis*, and *Hayden & Langhorne*, for appellant Armstrong.

Bates, Peer & Peterson, for respondent Bell Fuel Company.

DUNBAR, J.—The plaintiff, A. Grant, brought this action to recover judgment against appellant Armstrong and the defendant Bell Fuel Company, on account of personal injuries alleged to have been sustained through the negligence of said defendants. The facts constituting the cause of action will be better understood by setting forth paragraphs 2 and 3 of the complaint:

"(2) That on the 12th day of February, 1908, at about the hour of 2 p. m., the plaintiff in the regular course of his employment for the Fidelity Transfer Company was assisting the driver of the team of two horses and wagon along Jefferson avenue; that the plaintiff was riding on the wagon, guarding a large plate glass which was being hauled by said Fidelity Transfer Company, and that said wagon was in charge of a driver, A. F. Braga; that said A. F. Braga proceeded along said west side of said Jefferson avenue at or about the intersection of Jefferson avenue and Commerce street.

"(3) That the said team belonging to the Bell Fuel Company was in charge of a driver whose name is unknown to the plaintiff at this time, who was driving along said Jefferson avenue down to the center of the street and toward Pacific avenue; that the said driver carelessly and negligently allowed the lines to hang loose, and carelessly and negligently allowed said horses to walk along without control over said horses which he was driving, and carelessly and negligently placed himself in position on the hind running gear of his wagon in such a way and manner as to be unable to have control and gain control of his team of horses if they would suddenly start to run, and especially at the time they started to run as hereinafter stated; that the said John D. Armstrong was proceeding along said Jefferson avenue toward Pacific avenue, driving an automobile with license No. 1436; that the said John D. Armstrong carelessly and negligently ran his machine at the careless and negligent high rate of speed of about twenty miles per hour and in violation of ordinance No. 3006 of the city of Tacoma, an ordinance regulating the use and rate of speed at which automobiles and motor vehicles may be run in the city of Tacoma; that he ran down the left side of said street behind the said Bell Fuel Company's team in such a manner that it caused said horses to become

frightened, and that the said horses, due to the said carelessness and negligence of the said driver in not having said animals under control and the careless and negligent manner said driver was driving said team as hereinbefore stated, jumped and started to run and ran down said Jefferson avenue with great speed and ran into the wagon on which said plaintiff was riding, throwing the said plaintiff to the ground, breaking both bones of his right leg above the ankle, spraining his right ankle, crushing and injuring his left leg, striking his head and face and knocking out four of his teeth, maiming and injuring said plaintiff for life."

Upon the trial a nonsuit was granted as to the defendant Armstrong. The case was submitted to the jury as against the Bell Fuel Company, and verdict rendered in its behalf. On motion for a new trial, the lower court granted the same as against the defendant Armstrong, but denied the same as against the Bell Fuel Company. Defendant Armstrong appeals from the order of the court granting the motion for a new trial in his cause, and plaintiff Grant appeals from the judgment in favor of the Bell Fuel Company. We will first dispose of the appeal of plaintiff Grant.

The plaintiff raises many objections to the instructions of the court, and insists that his theory of the case was not given; but he did not present any instructions on the subjects regarding which he complains, and it was said by this court in *Allend v. Spokane Falls & Northern R. Co.*, 21 Wash. 324, 58 Pac. 244:

"The latter part of the objection goes rather to what is omitted from the instruction than what is contained in it. The remedy for this defect, however, is not by an exception merely. The complaining party must call the court's attention to the omission, and request such modifications or further instructions as he may think proper. Unless this is done, this court cannot afford relief";

citing many cases.

But, even if the court had committed error in respect to the matters complained of by the plaintiff, it would be harmless error in this case, for the overwhelming weight of the testi-

mony presented by the plaintiff was to the effect that the negligence of the driver of the Bell Fuel Company was not the proximate cause of plaintiff's injury, and if a verdict had been rendered and judgment entered it could not have been sustained under the undisputed testimony in this case. All the disinterested witnesses introduced by the plaintiff testified that the driver was holding his horses tightly, and doing what he could to keep them under control. It is true that the witness Braga, who was one of the parties injured and whose cause was united with that of Grant in the prosecution of the case, testified that he had called attention to the fact that the driver of the wagon was standing against the brakehold, and was driving with loose lines. If the jury believed all the witness said, it would not be sufficient to establish the negligence of the driver as the proximate cause of this injury. The driving of horses is not an exact or uniform science. There are no rules or course of study prescribed for drivers; as yet, no society or memberships asking for protection from alleged incompetent drivers. Some men drive with a loose rein; some with a tight rein. Some men are quicker of eye or hand than others. Men have different judgments in regard to the looseness or tightness with which a rein should be held. Some horses can be driven only with tight lines, and some only with loose lines. So that on that question there is such a multiplicity of opinion and so many different distinctions that the testimony in this case could not under any circumstances be held to be sufficient to charge the driver with negligence.

The other branch of the case presents a more difficult proposition. The appellant Armstrong's contention is that the court erred in granting the motion for a new trial. So that the only question for this court to determine, especially under the announcement by the court that the new trial was granted solely for the reason that the court had, on more mature deliberation, concluded that there was sufficient evi-

dence of negligence on the part of the automobile driver to go to the jury, is the question suggested by that announcement. If it should appear from the testimony of the plaintiff that there was no testimony to support the allegations of negligence contained in the complaint, it would be the duty of this court to reverse the order of the lower court granting the new trial. But if it should find from such testimony sufficient evidence which uncontradicted would sustain a judgment, then it becomes its duty to affirm the action of the lower court in granting the motion for a new trial.

It is contended by the defendant Armstrong that, under the terms of the complaint, all the negligence alleged is the negligence of the driver of the automobile in blowing his whistle when directly opposite the Bell Fuel Company's team, and that the allegation in regard to the careless and negligent high rate of speed set forth in the complaint is not connected with any allegation of a proximate cause. This contention, if the complaint were viewed in the light of the most technical rules of construction, might possibly be sustained, for it is a little disjointed and disconnected in its statements. But by the aid of liberal construction, we think it can be seen from the complaint that the intention of the pleader was that the negligence charged as the proximate cause of the injury was both the careless and negligent high rate of speed and the careless and negligent blowing of the whistle. Otherwise there would have been no occasion to have incorporated into the complaint the allegations of the careless and negligent high rate of speed, in violation of the city ordinance in regard to the regulation of the speed of automobiles. We think, therefore, that the defendant was fairly put on notice as to the negligent acts complained of as being the proximate cause of the injury.

The testimony was to the effect that this automobile was traveling at from twenty to twenty-five miles an hour. The jury would have been justified in concluding from the testimony that it was traveling at the rate of twenty-five miles

an hour. An ordinance was introduced in testimony prohibiting the running of automobiles on the streets where this accident occurred at more than ten miles an hour. It is urged by the defendant that the driver was not only not committing an indiscretion, but that he was doing his duty and obeying the law in blowing his whistle as he did, for the reason that an ordinance of the city provides that "every automobile or motor vehicle shall be provided with a bell or horn, which shall be rung or blown by the operator whenever there is danger of collision or accident, or when crossing any street upon which there is a street railroad track." But that ordinance must be construed in connection with the other ordinance limiting the rate of speed; and the blowing of the horn when an automobile is traveling at the rate of ten miles an hour might have a different effect altogether from the blowing of the horn when the same machine is traveling at the rate of twenty-five miles an hour.

While, under certain restrictions, automobiles are entitled to the use of the streets the same as other vehicles, by reason of the menace which they are to other vehicles and to pedestrians the drivers of such machines must exercise care and caution commensurate with the danger. The driving of an automobile down as thickly populated a street as the one in question here was, where, as the testimony shows, there were pedestrians and teams of all kinds, at the rate of twenty-five miles an hour, was a reckless act. It might well be that an automobile which was passing a team at the rate of ten miles an hour would not scare it or cause it to run off, while one going at the rate of twenty-five miles an hour would. There is a certain whir and swish accompanying the rapid passing of an automobile which is terrifying to a horse unaccustomed to it, especially when it passes in close proximity to it. According to the testimony the automobile was within fifteen feet of this team when its horn was first blown, and was very close to it when it passed. That the driver was negligent is plainly shown by his own testimony. On page

84 of the statement of facts he states that he did not see the team before they started to run. But when a man is propelling a large, dangerous machine like an automobile through a crowded street at the rate of twenty or twenty-five miles an hour, it is his duty to see teams that are immediately before him, before he is so close upon them that an accident cannot be averted. It might well be that, if the automobile had been driving within the time limits prescribed, this accident might have been averted if the driver of the automobile had been taking notice of that which was in the street before him and of which he should have been taking notice.

Under all the circumstances as shown by the testimony, we think there was sufficient evidence of the negligent action of the driver of the automobile being the proximate cause of the injury to carry the cause to the jury. The judgment will therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and MOUNT, JJ., concur.

[No. 7999. Department One. October 28, 1909.]

SUDDEN & CHRISTENSON, *Respondent*, v. BERT MORSE, *Appellant*.[1]

TRIAL—INSTRUCTIONS AS A WHOLE. Error cannot be assigned upon the giving of instructions which as a whole fairly presented the case to the jury.

SAME—REQUESTS. It is not error to refuse requested instructions which were covered in the general charge.

TRIAL—VERDICT—SPECIAL INTERROGATORIES—DISCRETION. The refusal to submit special interrogatories to the jury is discretionary and will not be reviewed except for manifest abuse of discretion.

TRIAL—VERDICT—SPECIAL FINDINGS—CONSISTENCY. Where, in an action on contract, the defense relied upon the plaintiff's failure to secure a certain option, and there was a dispute between the parties

[1]Reported in 104 Pac. 645.

as to whether the agreement for obtaining the option was entered into at San Francisco or was arranged between the parties by letter and completed subsequently, the finding of the jury, in an answer to an interrogatory, that the plaintiff did not obtain an option "in accordance with the agreement made in San Francisco," is not inconsistent with a general verdict for the plaintiff, but implies that the option was obtained subsequently; since special findings susceptible of a construction conforming to the verdict will be so construed.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered October 12, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

J. C. Cross and *W. I. Agnew* (*A. Emerson Cross*, of counsel), for appellant.

John C. Hogan, for respondent.

Morris, J.—This was an action upon a dishonored check, given by appellant to respondent, the defense being the failure of respondent to obtain an option for the purchase of a certain steamship, for the use and benefit of the appellant, the check being given for the purpose of obtaining such option, and as a first payment thereunder. It was also contended that, in its negotiations for such option, respondent acted contrary to its agreement with appellant, and with intent to defraud him, and a claim for damages resulting from such fraud was interposed. A reply denying these affirmative allegations was filed, and upon these issues a trial before a jury resulted in a verdict for plaintiff, and defendant appeals.

The errors suggested are in certain instructions given, in the failure to give instructions requested by appellant, and in the admission and rejection of evidence. It would serve no good purpose to set these instructions forth in full, as no points of law are involved in either the exceptions to those given or in the refusal to give those requested, further than their correct application to the facts involved. The court in

its instructions told the jury the findings of fact which would determine their verdict in favor of appellant or respondent, and while it may be that in one or two instances language more apt might have been chosen, yet a careful reading convinces us there was no reversible error; and that the instructions read as a whole correctly stated the law, and fairly presented the case to the jury upon the issues involved. We have so often held this to be sufficient that no citation of authority is necessary.

In so far as the requested instructions correctly stated the law applicable to the facts involved, the same was correctly given to the jury in the instructions given. When a court correctly charges a jury in its own language upon all points properly submitted to the jury, it is not error to refuse instructions prepared by counsel which correctly state the law, but are clothed in language which for any reason counsel may prefer to that chosen by the court. Neither do we find any error in the admission or rejection of testimony which, to our mind, in any wise affected the verdict.

Error is also predicated upon the refusal of the court to submit certain special interrogatories to the jury. This was a matter resting in the discretion of the court, and its ruling in that regard will not be reviewed except for manifest abuse of such discretion, which does not appear in this instance.

It is next urged that the court should have set aside the verdict and granted judgment in favor of appellant, upon the fourth special interrogatory submitted to the jury and the answer thereto, as follows:

"Did Sudden & Christenson obtain an option on the steamer M. F. Plant in accordance with the agreement made in San Francisco? Ans. No."

Appellant contends that, inasmuch as the jury found in this special verdict that respondent did not secure an option, and its right of recovery being dependent upon the obtaining of such an option, the special finding controls, and judgment should be entered in his favor. This special finding must be

read in the light of all the testimony, the issues involved therein, and the evident understanding of the jury in making answer. It was appellant's contention that the entire agreement between himself and respondent, under which respondent was to obtain the option, was included in negotiations had while appellant was first present at San Francisco; while respondent sought to establish an agreement embodied and embraced in certain telegrams and letters passing between the parties, subsequent to appellant's trip to San Francisco, and after his return to Aberdeen. The jury having returned their general verdict for respondent, based upon an evident finding that respondent did procure the option, the evident meaning of the jury in their special finding is, not that respondent did not procure the option, which would be inconsistent with the general verdict, but rather, having in mind the various contentions as to the time and place where the negotiations between the parties became embodied in a mutual agreement or understanding, it was evidently intended to mean a finding that the agreement was not made at San Francisco, but, as contended for by respondent, was made after appellant's return to Aberdeen. Such a reading and meaning is consistent with the general verdict, and where a special verdict is susceptible of a construction which conforms to and supports the general verdict, it will be so construed. *Mercier v. Travelers' Ins. Co.*, 24 Wash. 147, 64 Pac. 158; *McCorkle v. Mallory*, 30 Wash. 632, 71 Pac. 186.

Finding no error, the judgment is affirmed.

RUDKIN, C. J., and GOSE, J., concur.

CHADWICK, J. (concurring)—I believe the special verdict was warranted by the evidence, and if this case rested upon that consideration, would vote for a reversal. But, aside from all prior negotiations, the evidence shows that the money now sought to be recovered was paid out by respondents at the special instance and request of appellant subsequently made, and to cover which he drew and delivered the check

sued upon. It was a part payment on the vessel, and the question of prior option became immaterial. The advancement was a sufficient consideration, and warrants a recovery. I concur in the result.

FULLERTON, J., concurs with CHADWICK, J.

[No. 8140. *En Banc.* October 28, 1909.]

JOHN E. HUMPHRIES *et al.*, *Appellants*, v. DELLA COOPER *et al.*, *Respondents.*[1]

DIVORCE—ATTORNEY'S FEES—LIABILITY OF HUSBAND ON CONTRACT OF WIFE. In view of the liberal provisions of the code for suit money in actions for divorce, the husband is not liable for attorneys fees incurred by the wife in instituting a divorce which was settled and dismissed without the attorney's consent.

SAME—ATTORNEY'S FEES—LIABILITY OF WIFE. The wife is liable to attorneys employed by her to prosecute a divorce suit which was settled and dismissed without their consent.

PLEADING—DEMURRER. A general demurrer in an action against two defendants, only one of whom is liable, should be overruled as to one and sustained as to the other.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 15, 1909, in favor of the defendants, upon sustaining a demurrer to the complaint, in an action to recover attorney's fees. Reversed.

John E. Humphries and *George B. Cole*, for appellants.

William R. Bell, for respondents.

DUNBAR, J.—This is an action brought by appellants against respondents to recover attorney's fees. The material averments of the complaint are, that the appellants are attorneys at law, in King county, Washington; that the respondents were husband and wife on the 28th day of October,

[1]Reported in 104 Pac. 606.

1908, at which date the defendant Della Cooper employed the appellants to bring suit for divorce against the respondent W. H. H. Cooper, upon the grounds of cruel and inhuman treatment of the said Della Cooper by the said W. H. H. Cooper, setting forth in detail the cruel acts referred to; that on the said date, at the special instance and request of respondent Della Cooper, the appellants prepared a complaint, embodying the charges made by her against said W. H. H. Cooper, which complaint was duly verified by the said Della Cooper, and was regularly filed in the proper court, and that the same was served upon the defendant; that the plaintiff in said action asked for temporary alimony, attorney's fees, and suit money; that at the time of the commencement of said action, the said Della Cooper was without means to employ counsel or prosecute said action against the defendant, and was wholly without means for her support and maintenance or suit money, and that the defendant positively refused to furnish her money with which to support and maintain herself, avoided the service of process, and did everything in his power to prevent her from collecting of him, by order of court or otherwise, any money whatever; that at the time of the commencement of said action the defendant W. H. H. Cooper had property of the value of more than $20,000, and was doing a lucrative business; that said cause was set for trial April 1, 1909; that immediately prior to said date the respondents, for the purpose of cheating and defrauding appellants out of their attorney's fee, without any notice whatever to appellants, compromised, settled, and condoned the offenses set out in plaintiff's complaint, and signed a stipulation of dismissal of said cause, and went back to live together; that said cause was dismissed without consent of the appellants; alleging the value of their services. A demurrer was interposed to this complaint, to the effect that it did not state facts sufficient to constitute a cause of action against the defendants, or either of them. The demurrer was sustained, and the appellants, standing upon their complaint,

judgment was entered in favor of respondents, and from such judgment this appeal was taken.

It is contended by the appellants that the statements made by this court, in its opinion in *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. 135, would logically lead to the conclusion that the complaint in this case was sufficient to sustain a judgment against the husband. In this construction of that case we think the appellants are mistaken. It is true the court said:

"Claims for attorney's fees, where adjusted by actions, must be in actions brought for their adjustment, as claims of all other kinds are adjusted."

But there was no intimation that the claim for attorney's fees, if it had been brought in a separate action, would have been permitted. In fact, the logic of the opinion is to the contrary.

But this identical question was before this court in the form of action now presented, in the case of *Zent v. Sullivan*, 47 Wash. 315, 91 Pac. 1088, 13 L. R. A. (N. S.) 244. There, as here, after the contract with the attorney on the part of the wife to commence the action for divorce, and after the filing of the complaint and the service of summons, the action was dismissed by consent of the parties before final judgment, and suit was brought for the attorney's fees stipulated. In that case the authorities were collected and discussed, and while it was admitted that there was a conflict of authority on the question of the husband's liability for counsel fees, incurred by the wife in connection with divorce proceedings, whether she be plaintiff or defendant, it was held that the great weight of authority and the better reason was to the effect that such liability did not exist, and especially in this jurisdiction, where the statute made such liberal provisions for the wife in such cases, the court saying, after quoting Bal. Code, § 5722 (P. C. § 4636):

"In view of the liberal provisions of this statute, we see no possible reason why the wife is under a necessity to pledge

her husband's credit for the expenses of prosecuting or defending an action for divorce in this state, or why she should have any implied power in that regard."

In view of the fact that the question involved here was discussed so pointedly in the case of *Zent v. Sullivan, supra*, from the standpoint of both reason and authority, it would be idle to again enter into a discussion of that question, as we are satisfied with what was said in that case; and no distinction can be made between that case and this on the question of the liability of the husband.

But while the briefs of both appellants and respondents present the case as involving only the responsibility of the husband for the contract of the wife, the record shows that the demurrer challenged the responsibility of both the husband and wife, jointly or severally. The demurrer was sustained as a whole, and judgment was rendered in favor of both defendants. So that, notwithstanding the seeming waiver of this point by the appellants, we do not feel justified in disregarding the record. And, as we know of no reason why the wife should not be held responsible for her individual contracts, the judgment will have to be reversed, and the cause remanded with instructions to sustain the demurrer as to the liability of the husband only. The appellants will recover the costs of their appeal against the wife.

ALL CONCUR.

[No. 8309. Department One. October 28, 1909.]

J. I. Sexton *et al.*, *Appellants*, v. Washington Mining & Milling Company, *Respondent*.[1]

Mines and Minerals—Claims—Assessment Work—Road Building—Statutes. Laws 1899, p. 73, § 14, providing that road work may apply on assessment work on mining claims, when authorized by a public meeting of at least twelve property holders called by the mining recorder, applies only to organized mining districts.

Same—Roads Outside Claim—Unorganized Districts. The building and construction of roads intended to be used in the general development of mining property in an unorganized mining district, although done outside the boundaries of a claim, is the doing of assessment work on the claim, within the meaning of the mining law.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered April 14, 1909, upon the verdict of a jury rendered in favor of the defendant, in an action to recover possession of mining claims. Affirmed.

B. S. Grosscup and *W. C. Morrow* (*O. O. McLane*, of counsel), for appellants.

Johnston & Swindells, for respondent.

Morris, J.—Appellant sought in this action to recover possession of four mining claims, situate in the Tahoma Mining District, claiming discovery, location, and record of the same, between June 28 and August 4, 1908; said claims being contiguous to each other and forming one tract. On August 17, 1908, respondent took possession of the claims, and has since that time remained in such possession. The answer alleged a prior discovery, location, and record of these claims, by W. K. and A. M. Irish, on different dates between September 25, 1897, and April 5, 1902, the performance of all assessment work thereon, and full compliance with all necessary requirements up to August 18, 1908, when the same

[1]Reported in 104 Pac. 614.

were conveyed to the respondent. Appellants in their reply alleged an abandonment by the Irish brothers and failure to comply with the necessary requirements. Upon these issues being submitted to a jury, a verdict was returned in favor of respondent, and from the judgment thereon, this appeal is taken.

The controlling assignment of error is in the admission of evidence showing the payment of $400 by the Irish brothers upon the construction of a road in the year 1907. Such road crosses one of the claims in controversy, and the expense of such construction, within the boundaries of such claim, exceeded the sum of $400, the question upon this appeal being, can the construction of a road, without the boundaries of a mining claim, be credited as assessment work upon such claim, such road providing access to such claim and others contiguous thereto, and being built for the benefit of mines and mining claims in the district. Laws 1899, page 69, chapter 45, provides as follows:

"Sec. 13. Any mining district organized in the state of Washington in accordance with the laws of the United States, shall have power to make rules and regulations for such mining district, providing such rules and regulations do not conflict with the laws of the state of Washington or of the United States.

"Sec. 14. Any mining district shall have the power to make road building to mining claims within such district applicable as assessment work, or improvement upon such claims: *Provided*, That rules pertaining to such road building shall be made only at a public meeting of the miners of such district regularly called by the mining recorder of such district: *Provided further*, That such meeting shall be attended by at least twelve (12) property holders of such district, and that no such rule can be made without the assent of a majority of the property holders of such district, who are present at such meeting. Such meeting to designate where, when and how such road work shall be done, and shall designate some one of their number who shall superintend such road building or construction, and who shall receipt for such labor to the performer thereof, such receipts to be filed with

the county auditor of the county in which such work is performed by the holder or holders of such receipts, and shall be received as *prima facie* evidence of labor performed as annual assessment work upon such claim or claims, as may be designated by an affidavit or oath of labor as provided for in section six (6) of this act: *Provided*, That nothing in this act can be construed as being mandatory upon any owner or holder of mining property to perform labor upon any such road."

It is the contention of appellant that the legislature has, by this act, determined the manner, and only manner, in which road building may be claimed as assessment work upon mining claims within this state; and that, having prescribed a certain specific way in which road building may be credited as assessment work, the rule of *expressio unius est exclusio alterius* applies, and excludes all other methods of building roads as a credit upon the necessary assessment work upon mining claims. There was no attempt to show any meeting of the miners of this district, attended by at least twelve, for the purpose of adopting any rules or regulations providing for the building of roads to mining claims as assessment work upon such claims.

It is apparent that the legislature in the above act is providing a rule to apply in cases of organized mining districts, having a mining recorder, and it may be that within such an organized mining district the statutory method is exclusive; but can it be said that, because the legislature has provided an exclusive procedure in organized districts, the statutory rule applies to unorganized mining districts, or to districts where there are less than twelve property holders, and hence too few to properly organize within the purview of, and obtain the benefit of, that act? Such a construction would work a great hardship upon the unorganized district, or upon the district where the mines were too few to permit of twelve locations and twelve property holders, and would mean that one class of miners would be granted a privilege that would be denied to others less fortunate in making their locations in

sections too limited to admit of an organization by twelve property holders. The policy of the Federal government, and of the state, in so far as it has sought to legislate, has been to encourage the discovery and location of mining claims, and in so far as there has been an attempt to create legislative rules and restrictions, such acts have been for the evident purpose of protecting the Federal government and the state from any claim upon its mineral lands, except by the citizen in honest endeavor and good faith. With this view, the courts have uniformly held that any work done upon the claim, or outside of any claim, if done for the purpose of furthering the development of such claim, is permissible and available as assessment work, as if done within the boundaries of the claim itself. *St. Louis Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Mount Diablo Mill & Min. Co. v. Callison*, 5 Sawyer 439; *Book v. Justice Mining Co.*, 58 Fed. 106.

In *St. Louis Smelting Co. v. Kemp, supra*, the court says:

"Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be . . . at a distance from the claim itself."

Yet the language of the Federal statute is to the effect that:

"On each claim located . . . and until patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year." Act of 1872, ch. 6, § 2324.

If it had been the purpose of the courts to narrow the construction of this act, the rulings would have been, following the language of the law, that the improvement work must be done "upon each claim located." Having in mind, however, the policy of the government, the miner has been permitted

to go outside the boundaries of his claim and perform labor, the purpose and effect of which was to aid in the development of his claim as a mine, and when so performed such labor is regarded as falling within the requirement of the statute, and becomes labor performed "upon each claim." So that, independent of the statute, there could be little doubt but that the performance of this labor in the construction of a road aiding in the general development of the combined properties would be a full compliance with the statutory requirement as to assessment work. Such is the holding in *Doherty v. Morris*, 17 Colo. 105, 28 Pac. 85.

Following out these general principles and attitude of the courts in construing such statutes, we hold that the provisions of the quoted act in regard to road building apply only to organized mining districts, and that where there is no organized district, the building and construction of roads which can and are intended to be used in the general development of the mining property, is a doing of assessment and improvement work within the meaning of the law.

The court was right in admitting the challenged evidence, and its ruling and judgment is affirmed.

Rudkin, C. J., Fullerton, Chadwick, and Gose, JJ., concur.

[No. 8399. Department Two. October 28, 1909.]

CALVIN PHILIPS & COMPANY, *Respondent*, v. LOUIS LANGLOW *et al.*, *Appellants*.[1]

BROKERS — COMMISSIONS — EVIDENCE — SUFFICIENCY. Defendants cannot escape liability for commissions for securing a loan, upon the plea that their signed application was merely tentative and to determine whether a loan could be made, where a contract for the commissions was signed, the broker procured a party ready and willing to make the loan on the terms proposed in the application, and the conditions insisted upon as to the title were covered by the application.

SAME—DEFENSES—ACTING AS AGENT FOR BOTH PARTIES. A broker may act as agent of both parties, and is entitled to commissions agreed to be paid by one party, with knowledge that he was agent for the other party.

HUSBAND AND WIFE—COMMUNITY DEBT—LIABILITY OF WIFE—BROKER'S COMMISSIONS. The wife is liable, as a member of the community, upon the husband's contract to pay a commission for securing a loan which was a community debt contracted in the management of the community estate.

COURTS—REVIEW OF ITS OWN DECISIONS—DIFFERENT JUDGES. A decision by the trial judge upon deciding the case is not affected by the fact that another judge had ruled differently in deciding a demurrer in the case.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered March 13, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action on contract. Affirmed.

Loveday, Kelley & McMillan, for appellants.

Fogg & Fogg, for respondent.

MOUNT, J.—Respondent brought this action to recover upon a written contract for the payment of commissions in procuring a loan of $35,000 for the appellant Louis Lang-

[1]Reported in 104 Pac. 610.

low. The defense was based upon two grounds: (1) that the application for the loan was a mere tentative inquiry as to the terms upon which a loan could be procured; and (2) that the loan was to be secured by mortgage upon community real estate, and that the contract to pay a commission upon the loan was made by Louis Langlow without knowledge or authority of his wife. The case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for $365, and judgment was entered thereon. The defendants appeal.

It seems that the appellant Louis Langlow and his brother owned certain real estate in Tacoma. They desired to construct a building upon this real estate. In January, 1908, they caused a letter to be written to the Penn Mutual Life Insurance Company of Philadelphia, Pennsylvania, inquiring whether that company would make a loan of $40,000 upon their Tacoma property. The company replied that it had no funds at the time, but referred appellant to respondent Calvin Philips & Company, at Tacoma, through whom it said its loans were being made. Thereafter, on April 16, 1908, Louis Langlow applied to Calvin Philips & Company and signed an application for a loan from the Penn Mutual Insurance Company, for $35,000, for the term of five years, at five and one-half per cent per annum, to be secured by a first mortgage lien upon certain real estate. At the same time Louis Langlow signed an agreement to pay Calvin Philips & Company for its services in procuring the loan a commission of one and one-half per cent of the amount of the loan, and to permit Calvin Philips & Company to write the insurance carried on the buildings during the life of the mortgage. Thereafter the Penn Mutual Life Insurance Company accepted the application and agreed to make the loan as applied for, and directed the borrowers to report to Messrs. Fogg & Fogg, attorneys, for an examination of title and the completion of the loan. Some objections were made by the attorneys to the title of the lots offered as security, and sug-

gestions were made in order to make the mortgage lien good. The borrower desired money to be advanced for the construction of the building. The insurance company, in that event, required a bond to protect it against liens. While these negotiations were pending, the appellant obtained a loan from another party, and then declined to complete the loan with the insurance company. Calvin Philips & Company thereupon demanded its commission, which was refused, and this action followed.

Appellants contend that the facts show that the application was a mere tentative application to determine whether the loan would be made. A careful reading of the evidence convinces us, as it evidently convinced the jury, that the application was what it purported to be, and was not a mere inquiry. After the application was accepted, the applicants proceeded to carry out the loan, which they no doubt would have completed had they not obtained the money elsewhere, at the same rate of interest and upon substantially the same terms it was offered by the insurance company, but without the payment of any commission. It is true the contract with respondent for commissions provided: "If this application is not accepted, the said Langlow to be at no expense in connection therewith." But this clearly referred to the acceptance by the insurance company, and not the acceptance by the appellants. The application for the loan was accepted by the insurance company. It was not carried out, but the failure was not the fault of either the insurance company or of Calvin Philips & Company to comply with the agreements contained in the application and in the acceptance thereof. The conditions insisted upon by the insurance company were covered by the terms of the application. The fact that the respondent procured the loan, or a party ready and willing to make it upon the terms proposed in the application, was sufficient to entitle the respondent to its commission. 19 Cyc. 255; *Barnes v. German Savings & Loan Society*, 21 Wash. 448, 58 Pac. 569.

It is contended that the evidence shows that Calvin Philips & Company was the agent for the insurance company, and therefore not entitled to a commission from appellants. The evidence does show that the loans of that company were made through Calvin Philips & Company, but it is not shown that Calvin Philips & Company was compensated by the insurance company. It clearly appears that all the parties knew that Calvin Philips & Company was to be paid by the appellants for negotiating the loan. The rule is that an agent may act for both parties where the parties have full knowledge of the facts and consent thereto. 31 Cyc. 447-9.

Appellants also contend that, because Ingeborg Langlow, the wife of Louis Langlow, did not sign the application for the loan, or the contract to pay for the services rendered in procuring the same, and did not know of the contract, she was therefore in no way bound, and the respondent was not entitled to a judgment against her. Her separate property would not be liable for such a debt, but the debt is clearly a community debt contracted by the husband in the management of the community estate for the benefit of the community. The rule is that community property is liable for the payment of community debts. *Oregon Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 Pac. 1058, 19 L. R. A. 233; *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738. The judgment against her as a member of the community was therefore proper.

The case of *Holyoke v. Jackson*, 3 Wash. Ter. 235, 3 Pac. 841, and other cases cited by the appellants, to the effect that a husband cannot enter into a valid contract for the sale of community real estate without his wife joining therein, are not in point. That case is clearly distinguished from this in the case of *Andrews v. Andrews*, 3 Wash. Ter. 286, 14 Pac. 68, where the court said that case "determined nothing as to the power of the husband to bind the community real estate by a judgment recovered against himself for a community debt." The fact that the judge who tried the case ruled

differently upon this question from the judge who passed upon the demurrer to the original complaint is of no consequence, for the last ruling was correct. *Shephard v. Gove*, 26 Wash. 452, 67 Pac. 256.

Appellants further argue that the court erred in giving and in refusing to give certain instructions. The points made upon these instructions are in substance decided above, and need not be further considered.

We find no error in the record, and the judgment must therefore be affirmed.

RUDKIN, C. J., DUNBAR, and CROW, JJ., concur.

[No. 8143. Department Two. October 28, 1909.]

NETA CORNTHWAITE *et al.*, *Respondents*, v. BARRINGTON TRANSPORTATION COMPANY, *Appellant*.[1]

APPEAL—EXCEPTIONS—TO FINDINGS—TIME FOR TAKING—NOTICE. A motion to set aside findings and judgment, shows actual notice of the filing of the findings, and exceptions filed more than five days thereafter are not within time and should be struck out.

MONEY LENT — LIABILITY — FINDINGS — SUFFICIENCY. Findings support a judgment for plaintiff for $3,000 money loaned, where it appears that defendant received the same from plaintiff under an agreement to tender the same upon an option to purchase certain steamboats, and if the tender was accepted, to transfer certain stock to the plaintiff, but if not accepted, to return the money, and that the tender was not accepted, and plaintiff failed to return the money.

Appeal from a judgment of the superior court for King county, Kauffman, J., entered December 8, 1908, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Oliver F. Cutts, for appellant.

Byers & Byers, for respondents.

[1]Reported in 104 Pac. 609.

Crow, J.—Action by Neta Cornthwaite and others against Barrington Transportation Company, a corporation, and others, to recover the sum of $4,000. On trial without a jury, findings were made in favor of the plaintiffs, and a judgment was entered thereon for $3,000. The defendant, Barrington Transportation Company, has appealed.

Respondents have moved this court to strike the appellant's exceptions to the findings of fact and conclusions of law, for the reason that they were not made and filed within the time required by Bal. Code, § 5052 (P. C. § 669). It appears from the record that the findings, conclusions of law, and judgment were signed by the trial judge on December 7, 1908; that they were filed on December 8, 1908, and that the exceptions thereto were filed on February 18, 1909.

When appellant filed its exceptions it also filed an affidavit of one of its attorneys, in which it is alleged that no copy of the findings of fact, conclusions of law, or judgment, or any written notice of their filing, was served upon appellant or its attorneys. Upon this showing, the appellant now contends that the exceptions were made and filed in time. The record further shows that, on December 14, 1908, the appellant served its motion to set aside and vacate the findings and judgment, which motion was heard and denied on January 16, 1909. The making of this motion establishes the fact that the appellant had actual knowledge of the filing of the findings of fact, conclusions of law, and judgment as early as December 14, 1908. This being true, its exceptions were not filed within the statutory time and must be stricken. *Rice v. Stevens*, 9 Wash. 298, 37 Pac. 440; *Fisher v. Kirschberg*, 17 Wash. 290, 49 Pac. 488.

The exceptions being stricken, the only question remaining for our consideration is whether the final judgment is sustained by the findings made and entered. The trial court found that the appellant, Barrington Transportation Company, a corporation, had an option to purchase certain

steamboats; that it was unable to comply therewith, but that if the respondents would procure for it the sum of $4,000, it would be able to do so, and could make a tender on the purchase price at a time when it was claimed the same would be due; that it agreed with the respondents that, in case the purchase of the steamers was completed, it would transfer to them twelve hundred and fifty shares of its capital stock; but that, in case the tender when made was not accepted and the steamboats not secured, the money advanced by respondents should be immediately returned to them; that one F. X. Waldron, appellant's president, negotiated a loan of $4,000 for respondents upon their property, and received that sum from them; that he paid to appellant only the sum of $3,000; that appellant thereupon issued and delivered to respondents a certificate for twelve hundred and fifty shares of its capital stock; that appellant made a tender which was not accepted; that the purchase of the steamers was not completed; that in conformity with their agreement, the respondents returned to appellant the certificate of stock, but that it did not return the money advanced by them, or any part thereof. Unquestionably these findings support the judgment for $3,000, entered in favor of respondents. It is therefore affirmed.

Rudkin, C. J., Mount, Dunbar, and Parker, JJ., concur.

[No. 7707. *En Banc.* October 28, 1909.]

OLYMPIA LIGHT & POWER COMPANY, *Respondent*, v. TUMWATER POWER & WATER COMPANY, *Appellant*, OLYMPIA BREWING COMPANY, *Defendant*.[1]

EMINENT DOMAIN—PROCEEDINGS—REVIEW—APPEAL OR CERTIORARI. Under the eminent domain act, Bal. Code, § 5645, limiting the right to appeal in proceedings to condemn land to the question of the justness and propriety of the amount of the damages awarded, an intervening public service corporation, claiming a prior public use, whose petition in intervention was dismissed upon the sustaining of a demurrer thereto, occupies the same position as an original party, and is not entitled to prosecute an appeal from the judgment of dismissal before any award of damages, either under the eminent domain act, or the general appeal act, its remedy being by writ of certiorari (RUDKIN, C. J., FULLERTON, GOSE, and CHADWICK, JJ., dissenting).

Appeal by intervener from an order of the superior court for Thurston county, Linn, J., entered May 4, 1908, in favor of the plaintiff, upon sustaining demurrers to the answer and complaint in intervention, in proceedings to condemn certain water rights and an easement. Appeal dismissed.

G. C. Israel, Martin L. Pipes, George H. Funk, and *Frank C. Owings*, for appellant.

T. N. Allen and *Troy & Falknor*, for respondent.

CROW, J.—This action was commenced by the Olympia Light & Power Company, a public service corporation, in the superior court of Thurston county, under the eminent domain act, against the Olympia Brewing Company, a corporation, to condemn certain water rights and an easement. The defendant affirmatively alleged that it was the owner in fee of the property sought to be condemned; that on July 9, 1907, the Tumwater Power & Water Company, a public service corporation, was incorporated and organized under the

[1]Reported in 104 Pac. 778.

laws of the state of Washington, for the purpose of furnishing the municipality of Tumwater, its inhabitants, and others without the corporate limits of Tumwater, with water for drinking, irrigation, and domestic purposes, and with electric lights for light and power purposes; that prior to the commencement of this action, the defendant leased the use and enjoyment of the water power and easement to the Tumwater Power & Water Company, and placed it in possession thereof, and that it was a necessary party to the determination of the issues herein.

Upon permission first obtained by order of court, the Tumwater Power & Water Company filed its complaint in intervention, setting up its rights to the water power and easement, as lessee of the Olympia Brewing Company; alleging that it had devoted the same to a prior public use; that it held, by assignment, a franchise from the town of Tumwater, granting it the use of streets and alleys for laying mains and supplying the inhabitants of the town with water, and also the right to supply them with electricity for lighting, heating, and power purposes, and asked that the petition be dismissed. The petitioner interposed separate demurrers to the answer and complaint in intervention, which being sustained, the intervener declined to plead further, and an order was entered dismissing its complaint in intervention. From this order it has appealed.

The respondent has moved to dismiss the appeal. This is a condemnation proceeding. It is prosecuted under the eminent domain act, a special statute defining procedure in such cases, and authorizing an appeal for the sole purpose of presenting to this court the question of the propriety and justness of the amount of damages in respect to the parties to the appeal. Bal. Code, § 5645 (P. C. § 5110). No damages have yet been awarded, and it is evident that no appeal authorized by the eminent domain act could be prosecuted by an original party from the order here involved. In *Western American Co. v. St. Ann Co.*, 22 Wash. 158, 60 Pac. 158,

this court held that on an appeal in condemnation cases prosecuted under the eminent domain act, no question other than the amount of damages can be raised or considered, and that the general statutes pertaining to appeals do not apply. There the appellant attempted to prosecute an appeal for the purpose of obtaining the review of an order adjudging a public use and holding that the petitioner was authorized to exercise the right of eminent domain, but the appeal was dismissed as unauthorized.

The appellant contends that it is entitled to maintain this appeal under the general statute (Bal. Code, § 6500 *et seq.*; P. C. § 1048), for the reason that it was not an original party; that it is an intervener; that no order adjudging a public use has been entered; that no damages have been awarded; that it has been improperly dismissed from the action, and that it is entitled to prosecute the appeal for the purpose of securing its reinstatement, so that it may contest respondent's right to condemnation, and resist the obtaining of an order adjudging a public use. We fail to understand how the appellant, after filing its complaint in intervention, can be recognized or treated otherwise than as a party to the action. *Fairfield v. Binnian*, 13 Wash. 1, 42 Pac. 632. It is manifest that it could not thereafter occupy a more favorable position than if it had been an original party. The eminent domain act confers upon it no further or additional rights. After it had intervened, it was a party to a proceeding prosecuted under a special statute, which expressly limits the right of appeal.

The appellant, however, insists that as an intervener it is entitled to prosecute this appeal under the general appeal act. The difficulty with this position is that it would necessitate one method of procedure to be adopted by an original party in a condemnation proceeding, and a different and inconsistent method for an intervener. In other words, the Olympia Brewing Company as an original defendant would have to apply to this court for a writ of certiorari to secure

the review of any order herein other than one affecting the amount and justness of damages, while the intervener could not only proceed by appeal, but could also take such appeal within the period of ninety days fixed by Bal. Code, § 6502 (P. C. § 1050), or after the expiration of the thirty days fixed by Bal. Code, § 5645, as it has attempted to do in this case. The appellant served its notice of appeal on the Olympia Brewing Company, as original defendant, evidently regarding such service as necessary, it having appeared. The Olympia Brewing Company claimed appellant was a necessary party. Could it take a cross-appeal from the order of dismissal? If it could, its right to do so would not rest upon any statute, but upon the incidental fact that an intervener had prosecuted an original appeal under the general statute; but this court has unquestionably decided that the original defendant in a condemnation proceeding could only prosecute an appeal for the purpose of reviewing the amount or justness of damages. It is manifest that the appellant's contention, if sustained, would most seriously complicate appellate procedure in condemnation cases. This case is controlled by the rule announced in *Whatcom County v. Yellowkanim*, 48 Wash. 90, 92 Pac. 892.

As this court, in *State ex rel. Pagett v. Superior Court*, 46 Wash. 35, 89 Pac. 178; *State ex rel. Alexander v. Superior Court*, 42 Wash. 684, 85 Pac. 673, and other condemnation cases, recognized the right of a party to a review by certiorari of an order adjudging a public use, the appellant seems to infer that it could not proceed by certiorari, for the reason that the order here involved was not one of that character. As no public use has yet been adjudged, it insists that it can only obtain reinstatement as an intervener by appeal, or that it would be without remedy. The difficulty with the appellant's argument is that, in its final analysis, it appears to be predicated on the assumption that an order adjudging, or refusing to adjudge, a public use, is the only one that can be reviewed by certiorari. This, however, is not an accurate

interpretation of our former holdings. The order from which the appeal was taken in *Whatcom County v. Yellowkanim, supra*, was not one adjudging or refusing to adjudge a public use. The theory upon which a writ of review may be granted is that a nonappealable order has been entered depriving a party of some valuable right, and that he would be without remedy unless a review could be obtained by certiorari. The order from which the appeal has been taken in this action is not an appealable one, either under the eminent domain act or under the general statute.

The appeal is therefore dismissed.

MOUNT, DUNBAR, PARKER, and MORRIS, JJ., concur.

RUDKIN, C. J., FULLERTON, GOSE, and CHADWICK, JJ., dissent.

[No. 8256. Department Two. October 29, 1909.]

F. F. FISHER *et al.*, *Appellants*, v. THE CITY OF SEATTLE, and MATT H. GORMLEY, *as Treasurer of King County, Respondents.*[1]

MUNICIPAL CORPORATIONS—ANNEXATION—PUBLIC DEBT—WARRANTS—PAYMENT—FUNDING BONDS. Where an ordinance for the annexation of an adjoining city provided that no property within either former city shall ever be taxed for any portion of any prior indebtedness of the other, and after annexation, the city passed an ordinance making an appropriation out of its general fund "for the purpose of retiring certain outstanding warrants" of the annexed territory, and it appears from the ordinance that it was not the intention to extinguish the indebtedness or retire the warrants so as to relieve the property, but to refund them by a bond issue, the actual payment of the warrants of the annexed city with such funds did not extinguish the indebtedness as a charge against the property in the annexed city; and the issuance of funding bonds chargeable on such property was authorized.

SAME—LIMIT OF AMOUNT—PORTION VALID—FUNDING. Where a city is indebted in excess of its constitutional limit, the excess only

[1]Reported in 104 Pac. 655.

requires ratification; and funding bonds for a portion of the debt are valid without ratification, if the portion funded was within the constitutional limit.

SAME—LOAN OF CREDIT—FUNDING BONDS—ANNEXED TERRITORY. The constitutional prohibition against a city's loaning its credit to another corporation does not apply to the loan of funds to facilitate a bond issue for the payment of the indebtedness of annexed territory.

Appeal from a judgment of the superior court for King county, Main, J., entered September 10, 1909, upon sustaining a demurrer to the complaint, dismissing an action for an injunction. Affirmed.

J. P. Wall, for appellants, contended, *inter alia*, that the city of Seattle paid the warrants and could not thereafter issue funding bonds. *Coffin v. Indianapolis*, 59 Fed. 221; *Inhabitants of The Village of Schell City v. Rumsey Mfg. Co.*, 39 Mo. App. 264. A voluntary payment, made under mistake of law but with full knowledge of all the facts, and not induced by fraud of the payee, cannot be recovered. *Elliott v. Swartwout*, 35 U. S. 137, 9 L. Ed. 373; *Elston v. Chicago*, 40 Ill. 514; *Mayor etc. of Richmond v. Judah*, 5 Leigh (Va.) 331; *Jefferson County v. Hawkins*, 23 Fla. 223, 2 South. 362.

Scott Calhoun and *Bruce C. Shorts*, for respondents, to the point that extinguishment of the warrants by payment depends on the intention, cited: 18 Am. & Eng. Ency. Law (2d ed.), p. 150; 2 Daniel, Negotiable Instruments (4th ed.), § 1221; *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524; *Morrow v. Surber*, 97 Mo. 155, 11 S. W. 48; *Elser v. City of Ft. Worth* (Tex. Civ. App.), 27 S. W. 739; *Cushing v. Wyman*, 44 Me. 121.

MOUNT, J.—The appellants brought this action to prevent the city of Seattle from disposing of certain bonds, and from levying a tax upon certain property to pay the said bonds and the indebtedness evidenced thereby. The lower court sus-

tained a general demurrer to the complaint. Plaintiffs elected to stand upon the allegations of the complaint, and the action was dismissed. They appealed from that judgment.

The complaint alleges, in substance, that the plaintiffs are the owners of certain lots in the Thirteenth ward of the city of Seattle; that prior to May 20, 1907, the said Thirteenth ward was a municipal corporation of the third class under the name of Ballard; that on said date Ballard was regularly annexed to the city of Seattle as the Thirteenth ward thereof; that at the time of such annexation the indebtedness of the city of Ballard was $103,192.37, and the available assets amounted to $12,712.76, leaving a net indebtedness of $90,479.61; that the taxable property of Ballard, as shown by the last assessment, amounted to $4,741,119, and that such indebtedness exceeded the constitutional limit of one and one-half per cent of the taxable property of Ballard; that after annexation of Ballard to the city of Seattle, that city passed an ordinance, entitled:

"An ordinance appropriating the sum of seventy-two thousand five hundred ($72,500) dollars, or so much thereof as may be necessary, out of the general fund, of the city of Seattle, for the purpose of retiring certain outstanding warrants of the city of Ballard, authorizing the drawing and paying of general fund warrants therefor, and directing the city treasurer to collect said warrants." (Ordinance, Seattle No. 16,375.)

which ordinance became effective in July, 1907; that said city of Seattle thereafter paid $65,000 of the aforesaid indebtedness of the city of Ballard, and on March 3, 1908, the city of Seattle submitted to all the voters of the entire city the question of ratification of the illegal indebtedness of the former city of Ballard, and the further question of issuing $65,000 of bonds for the purpose of selling the same and returning to the city of Seattle the money expended in the payment of the debt of the city of Ballard; that the entire city of Seattle ratified the indebtedness and voted to issue such bonds; that immediately thereafter the city of Seattle issued

and offered said $65,000 of bonds for sale, and is now attempting to sell the same; that said bonds were made redeemable by taxation upon the Thirteenth ward only, and that in the year 1908 the city levied a tax of 51-100 mills upon the property in said ward to pay interest on such bonds.

Appellants argue that the payment of the indebtedness by the city of Seattle extinguished the debt, and that the city of Seattle may not fund an indebtedness which does not exist; that if the indebtedness exists at all, it is illegal because in excess of the constitutional limitation, and has not been validated by the voters of the Thirteenth ward whose property is liable for the debt; that the city of Seattle cannot loan its money or credit, and that the tax levied is void. We shall briefly consider these contentions.

The fact that the city of Seattle appropriated from its general fund $72,500 for the purpose of retiring certain outstanding warrants issued by the city of Ballard, and actually paid $65,000 thereof, did not necessarily extinguish such indebtedness so as to relieve the taxable property of Ballard, unless it was clearly intended to do so. *Bardsley v. Sternberg*, 18 Wash. 612, 52 Pac. 251, 524. It was said in that case:

"The intention of the obligor is important in determining the question whether obligations have or have not been extinguished."

The statute under which the district comprising Ballard was annexed to Seattle expressly provided,

"That no property within either of the former corporations so consolidated shall ever be taxed to pay any portion of any indebtedness of either of the other of such former corporations, contracted prior to, or existing at, the date of such consolidation." Laws 1903, p. 282, ch. 145.

If the city of Seattle undertook, by the ordinance mentioned, to use its general fund for the purpose of paying an indebtedness contracted by the city of Ballard before annexation, such ordinance was in the face of the statute quoted.

Before the ordinance is held to require acts to be done in violation of the statute, it must clearly appear to do so. At the time this ordinance was passed, Ballard had been annexed to the city of Seattle as the Thirteenth ward thereof. Seattle was, therefore, under obligation to exercise its taxing power over the annexed territory in order to pay the indebtedness of such territory, which for all purposes of government was a part of the city of Seattle. *DeMattos v. New Whatcom*, 4 Wash. 127, 29 Pac. 933. An examination of the ordinance clearly shows that there was no intention on the part of the city of Seattle to extinguish the indebtedness or retire the warrants so as to relieve the property liable therefor, but the object clearly was to take up these warrants and refund them by a bond issue. Money was advanced or loaned by one fund to another in order to accomplish that purpose more readily. The city has authority to advance or loan money from one fund to another. City Charter, art. 9, § 17. The payment of the original warrants in this way did not, in our opinion, extinguish the indebtedness, but such indebtedness still existed as a charge against the property of the Thirteenth ward, and the city might, therefore, issue funding bonds to be paid by the property in such ward.

It may be conceded, for the purposes of this case, that the indebtedness of Ballard prior to annexation was in excess of the constitutional limit, but it does not follow therefrom that the whole of such indebtedness was illegal or required ratification. The excess only would require ratification. The complaint shows that the city has funded but $65,000, which is well within the constitutional limit. It cannot be assumed that the city is funding any of the illegal debt, if any existed. It follows from the fact that Ballard had become annexed to the city of Seattle and was a part of that city, that the provision of the constitution prohibiting cities from loaning their money or credit in aid of any other corporation does not apply in this case.

We think no cause of action is stated in the complaint, and the judgment appealed from is therefore affirmed.

RUDKIN, C. J., CROW, and PARKER, JJ., concur.

[No. 8331. Department Two. October 29, 1909.]

GENERAL LITHOGRAPHING & PRINTING COMPANY, *Respondent*, v. AMERICAN TRUST COMPANY, *Appellant*.[1]

JUDGMENT—DEFAULT—APPEARANCE—TIME. A demand for a bill of particulars, made after defendant is in default and while a motion for a default is pending, comes too late and does not prevent judgment by default.

JUDGMENT—DEFAULT—NOTICE—APPEARANCE. After entry of default for failure to appear and answer in time, the defendant is not entitled, by reason of later appearance, to notice of application for judgment, under Bal. Code, § 5090, entitling him to five days' notice of proceedings if he gives notice of appearance before the time for answering expires.

JUDGMENT—DEFAULT—VACATION—MERITS. The denial of a motion to vacate a default judgment will not be disturbed when there was no showing of merits on the motion to vacate.

Appeal from a judgment of the superior court for King county, Ronald, J., entered April 12, 1909, in favor of the plaintiff, by default, a motion to vacate the same having been denied. Affirmed.

Howell & Benjamin, for appellant.

Shank & Smith, for respondent.

MOUNT, J.—This appeal is prosecuted from a default judgment rendered against the appellant. It appears that respondent brought the action against the appellant upon an account. Service of the summons and complaint was made on March 3, 1909. After the twenty days for answer

[1]Reported in 104 Pac. 608.

had expired, and on March 31 of the same year, appellant served a general notice of appearance in the case, but filed no pleadings therein. On April 5 respondent served and filed a motion for default, and with it a notice that the motion for default would be brought on for hearing on April 10. On April 9 the appellant served and filed a demand for a bill of particulars. On the next day the motion for default came on to be heard, and was granted by the court, and an order of default entered against the appellant. On April 12 a judgment was entered as prayed for in the complaint. On April 17 appellant moved the court to set aside the default and judgment. No showing of merits was made. This motion was denied, and the appeal followed.

It is claimed by the appellant that the court erred in granting the default while the demand for a bill of particulars was on file. This demand for a bill of particulars was not filed until after the appellant was actually in default and a motion therefor had been served and filed and was noticed to be heard on the next day. This question is disposed of in the case of *Haynes v. Schwartz Co.*, 5 Wash. 433, 32 Pac. 220, where the court said:

"The law gave the defendant in this action twenty days in which to answer. It also gave him notice that, if he did not answer within that time, the plaintiff would be entitled to move for a default. He did not answer within twenty days, and the plaintiff had moved for a default and had served him with notice of such motion, and under the rules of the court he could not then file his answer without leave of the court. The action of the court in granting the default must relate back to the time at which the motion for default was made. If plaintiff's theory is true, a defendant can forestall all default proceedings by filing his answer after the motion for default is served and filed, and the court would be deprived of all discretion in the very cases where the largest discretionary powers in the court are universally conceded."

This language applies with equal force to this case.

It is also claimed that the court erred in granting a judg-

ment without further notice to appellant, after the order of default had been entered. The statute provides:

"If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint." Bal. Code, § 5090 (P. C. § 735).

The appellant did not appear in this case until after the expiration of the time for answering. But, if his appearance was in time, as it probably was, to entitle him to notice of subsequent proceedings, the required notice was given upon the motion for default, and an order of default was rightly entered.

"After default a defendant cannot be heard to contest the subsequent proceedings, and certainly it would be a useless thing to require notice of such proceedings to be served upon him." *Norris v. Campbell*, 27 Wash. 654, 63 Pac. 939.

See, also, *Hyde v. Heaton*, 43 Wash. 433, 86 Pac. 664. There was, therefore, no error in granting the judgment.

There was no showing of merits on the motion to vacate the judgment, and no good reason is shown for setting the judgment aside. It must therefore be affirmed.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

[No. 8375. Department Two. October 29, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. WILLIAM HANOVER, *Appellant*.[1]

CRIMINAL LAW—STATUTES—REPEAL—EFFECT ON PENDING PROSECUTION. The repeal of the act of 1890, § 8, relating to the practice of medicine without a license, by the act of 1909, p. 677, without any saving clause for the prosecution of offenses committed under the old law, bars pending prosecutions, and a conviction thereunder is error (Reversed on rehearing).

CRIMINAL LAW—STATUTES—REPEAL—EFFECT ON PENDING PROSECUTION. The saving clause in Laws 1901, Ex. Ses., p. 13, providing that

[1]Reported in 104 Pac. 624.

no pending prosecution for any offense shall be affected by any repeal of a criminal or penal statute, unless the contrary intention is expressly declared in the repealing act, is constitutional; and a pending prosecution for practicing medicine without a license, is not affected by Laws 1909, p. 677, repealing former laws before trial and conviction of the accused.

PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—EVIDENCE—TWO OFFENSES. A conviction for practicing medicine without a license cannot be objected to in that there were two forms of offense proven, where there was no attempt to charge more than one crime, and the testimony as to the several *indicia* of practicing was merely evidentiary; especially where the only objection to such evidence was that it was immaterial and the accused admitted that he had no license.

APPEAL—BRIEFS—ASSIGNMENT OF ERROR. Objection to the sufficiency of the information made upon oral argument will not be considered where it was not assigned as error in the brief.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered May 1, 1909, upon a trial and conviction of the crime of practicing medicine without a license. Reversed.

John T. Casey (*Milo A. Root*, of counsel), for appellant.

MOUNT, J.—The appellant was prosecuted under the provisions of § 8 of the act of 1890, relating to the practice of medicine and surgery. He was charged with practicing medicine without a license, and was convicted and sentenced to pay a fine. He appeals from that judgment.

The state has made no appearance in the case in this court. The information alleges that the act was committed on October 26, 1908, in King county. A trial was had in the month of April, 1909. A judgment was entered against appellant on May 1, 1909. Between the date when the offense is charged to have been committed and the date of the trial, the state legislature passed a new act regulating the practice of medicine and surgery, and repealing prior acts. This last act contained an emergency clause, and took effect upon its approval, viz., March 18, 1909. Laws 1909, p. 677. This

act contained no saving clause for the prosecution of offenses committed under the old law. Under well-settled principles of law, there was no authority at the time of the trial for the prosecution of the appellant upon the offense charged. In *State v. Oliver*, 12 Wash. 547, 41 Pac. 895, the statute under which the defendant was prosecuted was repealed without a saving clause as to prior offenses, and this court held that the prosecution was barred. And in *State v. Allen*, 14 Wash. 103, 44 Pac. 121, where an act was repealed without any saving clause, pending an appeal to this court, it was held that a prosecution under the repealed act was barred, the court saying:

"It is familiar law that the repeal of a statute pending a prosecution thereunder, without any saving clause as to such prosecution, will prevent its being further prosecuted, and this rule applies as well after judgment and sentence, pending an appeal duly taken therefrom, as before the final determination in the trial court."

The judgment appealed from must therefore be reversed, and the appellant discharged.

RUDKIN, C. J., CROW, PARKER, and DUNBAR, JJ., concur.

ON REHEARING.

[Department Two. Decided March 4, 1910.]

John T. Casey (*Milo A. Root*, of counsel), for appellant.

The Attorney General, for respondent.

DUNBAR, J.—This case was heard by this court at the October term, 1909, and decided October 29th. There was no appearance by the state. It was urged by the appellant that the statute under which he was informed against, viz., section 8, page 119, of the Laws of 1889-90, had been repealed between the date when the offense was charged to have been committed and the date of the trial, by an act of the legislature regulating the practice of medicine and surgery, Laws 1909, page 677, which by reason of an emergency

clause took effect March 18, 1909, which was before the trial and conviction of the appellant. This court took that view of the law, and the judgment of the lower court was reversed. But chapter 6 of the Extraordinary Session Laws of 1901, page 18, was not called to the attention of the court, and was inadvertently omitted from consideration. Upon the occurrence of this statute to the minds of the court, upon its own motion it set the case for a rehearing, and called upon the attorney general to appear in behalf of the state; which he did, by both brief and oral argument. The provision above referred to is as follows:

"No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to cover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein."

If this act is constitutional, it must be seen that the former opinion of the court was wrong on the point on which it was based, and its constitutionality is not seriously called in question by appellant. But the validity of the act has been declared at least twice by this court; first, in *State v. Fair*, 35 Wash. 127, 76 Pac. 731, 102 Am. St. 897, where, after a careful and extensive review of the authorities, the

conclusion was reached that the act was constitutional; and afterwards, in *State v. Ames*, 47 Wash. 328, 92 Pac. 137, where the same conclusion was reached. The saving clause under consideration is in all essentials like the saving clause embraced in section 13 of the Revised Statutes of the United States, the validity of which was sustained in *Great Northern R. Co. v. United States*, 208 U. S. 452; *United States v. Reisinger*, 128 U. S. 398, and by an unbroken line of cases in the Federal courts. It therefore becomes our plain duty to reverse our former decision, so far as it was based on the proposition discussed therein.

It is, however, urged by appellant that the judgment should be reversed because it is alleged that there were two forms of offense proven; that the testimony as to the use of the letters M. D. and certain other indicia of practice should have been excluded, and that the requirement of the statute that the indictment or information must charge but one crime and in one form only, except in certain instances, has been violated. But the information shows that there was no attempt to charge more than one crime. The substantive charge is practicing medicine without a license, and these other matters that were introduced were simply evidentiary, tending to prove the commission of the substantive charge. The only ground of objection raised was that they were immaterial, and that ground is not urged here. But, even if it should be conceded that they were immaterial, the testimony would be harmless, for the appellant openly confessed that he had no license, and positively declared that he would not comply with the requirements of the medical board because he did not deem them just.

There was some oral discussion by counsel as to the sufficiency of the information, but as no assignment of that kind was made in the brief, we will not discuss it.

It seems plain from the whole record that the judgment should be affirmed, and it is so ordered.

RUDKIN, C. J., MOUNT, PARKER, and CROW, JJ., concur.

[No. 8149. Department Two. October 29, 1909.]

HENRY LOHMAN, *as Administrator etc., Appellant*, v. HENRY CLAUSSEN, *Receiver etc., Respondent.*[1]

APPEAL—REVIEW—STATEMENT OF FACTS—NECESSITY. The allowance for receiver's fees cannot be reviewed on appeal in the absence of a statement of facts or bill of exceptions containing the evidence upon which the court based the allowance, it being presumed that the court did not abuse its discretion.

RECEIVERS—COMPENSATION—LIABILITY OF PARTY FOR. The court has jurisdiction, in a proper case, to charge against the plaintiff the compensation of a receiver appointed at plaintiff's instance to take charge of property, especially where most of the property was adjudged to belong to defendants claiming the same in litigation waged by the plaintiff pending the receivership.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered December 9, 1908, allowing compensation to a receiver appointed pending the foreclosure of a mortgage, after a trial on the merits before the court. Affirmed.

Lueders & Phelps, for appellant.
Ray & Dennis, for respondent.

PARKER, J.—This is an appeal from a judgment rendered against appellant in favor of respondent for the sum of $500 as compensation for his services as receiver in this action. The suit was commenced by Mary Lohman to foreclose a chattel mortgage given to her by the defendant West Side Lumber Company, upon its sawmill plant and fixtures, to secure the sum of $1,200.

On November 8th, 1907, soon after the commencement of the suit, the respondent was appointed receiver to take charge of the property pending the foreclosure, at the instance of the plaintiff, and thereupon took possession of the plant and fixtures. Certain other defendants, who had been

[1]Reported in 104 Pac. 624.

made such for the purpose of foreclosing their interests, filed answers claiming to be owners of a large part of the machinery and fixtures by virtue of conditional sale contracts, entered into with the defendant West Side Lumber Company, and duly recorded in the office of the auditor of Pierce county. Replies to these answers were filed by the plaintiff and her administrator, who had been substituted as plaintiff, she having died since commencing the action, thus putting in issue the ownership of the machinery and fixtures covered by the conditional sale contracts. The defendant West Side Lumber Company failing to answer, was adjudged to be in default. Thereafter the issues as to the ownership of the machinery and fixtures covered by the conditional sale contracts were tried by the court, and on June 13, 1908, the court rendered its judgment and decree in favor of the answering defendants as to the property claimed by them, and by the same decree foreclosed the mortgage and ordered the remainder of the property sold to apply on the debt thereby secured. Special execution was issued to the sheriff accordingly. Thereupon the respondent petitioned the court for an allowance of his compensation as receiver, and that judgment be rendered in his favor and against the plaintiff and defendants for any balance remaining due in the event the remaining property then about to be sold by the sheriff should not yield sufficient funds for that purpose. The plaintiff answered the receiver's petition, and the matters being submitted to the court upon the merits, judgment was rendered in favor of the receiver and against the appellant, as administrator, in the sum of $500. Prior to the hearing upon the question of the receiver's compensation, the sale was had under the foreclosure, when the remaining property was bid in by the plaintiff for $200. The plaintiff appealed from the judgment rendered against him, as administrator, for the receiver's compensation.

Appellant assigns as error, and contends that the trial court erred (1) in allowing the receiver $500, because such

compensation is excessive; (2) in refusing to charge the whole amount of the expense of the receivership to the property cared for by the receiver; and (3) that the court was without jurisdiction to render judgment against plaintiff as administrator for the receiver's compensation.

We are unable to review the trial court's action in fixing the amount of the receiver's compensation, since there is no statement of facts or bill of exceptions in the record showing the evidence before the court as to the amount of the receiver's services. This was one of the issues of fact raised by the receiver's petition and appellant's answer thereto. It does appear that the receivership covered a period of some seven months. We must presume, in the absence of the evidence, that the trial court did not abuse its discretion in determining the amount of the receiver's compensation.

The other two assignments of error involve the question of whether or not a court has the power under any circumstances to render a judgment against a party to the suit in favor of the receiver for his compensation. That there may be circumstances warranting the charging of the compensation of a receiver, in whole or in part, against a party to the action, instead of against the fund or property in his possession, has been recognized by this court. *Lammon v. Giles*, 3 Wash. Ter. 117, 13 Pac. 417; *Brundage v. Home Sav. & L. Ass'n*, 11 Wash. 288, 39 Pac. 669.

While we have no statement of facts before us showing all the facts and circumstances which induced the trial court to render judgment against the plaintiff for the receiver's compensation, it can be readily seen from the record that such facts may have existed and been proven as to fully warrant the court's action. The receiver was appointed and took charge of the whole plant, including the machinery and fixtures not subject to the mortgage. This was done at the instance of the plaintiff and over the objections of the defendants, who were adjudged to be the owners of a large portion of the machinery and fixtures, after several months of litiga-

tion in the action, wherein the plaintiff was contending that such machinery and fixtures were the property of the defendant West Side Lumber Company, the mortgagor, and subject to the mortgage. Having failed in this contention, the court may have quite properly concluded, under all the facts of the case, that the owners of this property should not be burdened with any of the expense of the receivership by having their property charged therewith. In support of the court's jurisdiction to render judgment in favor of the receiver for his compensation against the party securing his appointment, the following may be cited: *Farmers' Nat. Bank v. Backus*, 74 Minn. 264, 77 N. W. 142; *Highley v. Deane*, 168 Ill. 266, 48 N. E. 50; *Knickerbocker v. McKindley Coal & Min. Co.*, 67 Ill. App. 291; *Tome v. King*, 64 Md. 166, 21 Atl. 279; *French v. Gifford*, 31 Iowa 428; *Ephraim v. Pacific Bank*, 129 Cal. 589, 62 Pac. 177.

We are of the opinion that the court had jurisdiction to render judgment against the plaintiff, as administrator, for the receiver's compensation; and in so doing, the record discloses no error or abuse of discretion. The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and MOUNT, JJ., concur.

[No. 8380. Department Two. October 29, 1909.]

LAURA P. BARKER, *Appellant*, v. OTTO MUEHLER, *Respondent*.[1]

TAXATION—SALE OF LAND—FORECLOSURE OF CERTIFICATE—STATUTES—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT. A certificate of purchase of lands forfeited to a county for taxes, pursuant to Laws 1893, p. 323, §§ 115, 134, entitles the holder to a tax deed upon application within one year after the time for redemption expires; and the certificate was not converted into a certificate of delinquency that could be foreclosed by the act of 1897, p. 136, § 116, since the legislature could not impair the obligation of the contract; and an action to foreclose the same is properly dismissed.

[1]Reported in 104 Pac. 637.

SAME—STATUTES—CONSTRUCTION. Laws 1897, p. 136, § 116, authorizing the foreclosure of prior tax liens is expressly limited to lands forfeited to the county for taxes due and remaining unpaid at the date of the passage of the act, and was not intended to apply to forfeited lands upon which the taxes had already been paid by purchasers and certificates of purchase issued under the law of 1893.

SAME—TAX DEED—LIMITATIONS. A certificate of purchase issued for lands forfeited to a county for taxes under the act of 1893, is void under § 133 of the act, if a deed is not taken out and recorded within one year after the expiration of the time for redemption.

TAXATION—PROCEEDINGS—GENERAL RELIEF—JURISDICTION. A tax foreclosure is a special proceeding for a special purpose, and if it fails, the court cannot retain jurisdiction to grant general relief or establish an equitable lien for taxes paid.

Appeal from a judgment of the superior court for Pierce county, Shackleford, J., entered February 13, 1909, in favor of the defendant, dismissing an action to foreclose a tax certificate, after a trial before the court without a jury. Affirmed.

J. W. A. Nichols, for appellant.

Boyle, Warburton & Brockway, for respondent.

RUDKIN, C. J.—On the 11th day of November, 1896, the county treasurer of Pierce county issued to one O. W. Wahlgren a certificate of tax sale in the following words:

"I, Jno. B. Hedges, treasurer for and within said county, do hereby certify that pursuant to an order of sale to me directed and delivered, issued out of the superior court of the state of Washington, holding terms at Tacoma, in and for said county, on the 11th day of May A. D. 1896, upon a real estate tax judgment rendered in said court on the 11th day of May, A. D. 1896, in favor of the state of Washington, and against the hereinafter described piece, parcel or tract of land, for the sum of forty-seven 29-100 dollars, being the amount adjudged due and owing for taxes for the year 1892, with interest, penalty, and costs added thereto since becoming delinquent, and said amount being a subsisting lien thereon as against the estate, right, title, interest, claim or demand in law or equity of every person, company, corporation or claimant whomsoever, I did on the 8th day

of Sept., 1896, offer for sale at public auction, the bidder offering to pay the amount due on each tract or lot for the least quantity thereof, at the front door of the court house in said county, having given due notice of such time and place of sale, according to law. That at such sale there being no bidder therefor the following described pieces, parcels or tracts of land were forfeited to said Pierce county, to wit:

[Here follows description of property.]

"And that one O. W. Wahlgren thereafter purchased the same from said county and paid me therefor the sum of Fifty 12-100 Dollars on the eleventh day of Nov., 1896, the same being in full for the amount of said judgment, costs and interest accruing to the said date of payment wherefore I do hereby certify that the said O. W. Wahlgren purchaser, his heirs, executors, administrators or assigns, will be entitled to a deed of conveyance of all the above described property after the expiration of three years from date of sale, unless the same be redeemed within said time, as provided by law. Provided that unless the holder of this certificate shall take out a deed for the above described real estate, as entitled by law, and file the same for record within one year from and after the time he is entitled to such deed, to wit: after the expiration of three years from date of sale, then this certificate and any deed given hereon, and the sale on which the same are based, shall, from and after the expiration of such one year, be absolutely null, unless the holder of this certificate be prevented from obtaining such deed by resale of above described real estate, injunction or order of any court, or by the refusal of the treasurer to execute the same, in either of which cases the time he is so prevented shall be excluded from the computation of such time."

The certificate was issued pursuant to §§ 115 and 134 of the revenue law of 1893, Laws of 1893, p. 323. The former section provides that,

"Every tract or lot so offered at public sale, and not sold for want of bidders, shall be forfeited to the county in which such property is situated, and in which such sale is made . . . ."

The latter section provides that,

"If any person shall desire to redeem, or purchase, any tract of land or lot forfeited to the county, he shall apply

to the county treasurer who shall receive from such person the amount due on said tract or lot, together with the penalty, interest and costs and all taxes heretofore forfeited, and shall give such person a duplicate receipt therefor, setting forth a description of the property and the amount received, which receipt shall be evidence of the redemption or sale of the property therein described, as the case may be. In case of sales the county treasurer shall make the receipt in the form of a certificate of purchase, in the same manner as though said property had been bid off at the regular sale for delinquent taxes. Property purchased under this section shall be subject to redemption notice, etc., as if sold at regular tax sale."

The plaintiff became the owner of the above certificate under successive assignments, and instituted this proceeding to foreclose the same by notice under § 96 of the revenue act of 1897, p. 136, and the acts amendatory thereof, denominating the certificate of tax sale a certificate of delinquency.

At the trial the court sustained an objection to the admission of the certificate in evidence, also to an offer to prove the subsequent payment of taxes on the property described in the certificate, and dismissed the action. From the judgment of dismissal, this appeal is prosecuted.

The contention of the appellant is that her certificate of tax sale was converted into a certificate of delinquency by § 116 of the revenue law of 1897, p. 136, and the acts amendatory thereof, and that she has a right to foreclose the same under existing laws. This contention cannot be sustained. At the time of the passage of the act of 1897, the predecessor in interest of the appellant was a purchaser at tax sale, and the legislature could not impair the obligation of his contract by converting his certificate of sale into a mere certificate of delinquency. Cooley, Constitutional Limitations (7th ed.), p. 413; *Hull v. State*, 29 Fla. 79, 11 South. 97, 30 Am. St. 95, 16 L. R. A. 308.

Perhaps the owner of the certificate is the only person who could raise the constitutional question, but the fact that the legislature could not lawfully accomplish such a

result, if it would, is a cogent reason for holding that it did not so intend, and a mere reference to the statute upon which the appellant relies convinces one that it did not. Laws of 1897, §116, *supra*, is by its terms limited to *lands forfeited to the county for delinquent taxes due and remaining unpaid at the date of the passage of the act*, and while the land in controversy was originally forfeited to the county, the forfeiture was converted into a tax sale by the issuance of the certificate under which the appellant claims, and the taxes were paid to the county long prior to the passage of the act of 1897. The remedy of the appellant or her predecessor in interest was to obtain a tax deed under the provisions of the revenue act of 1893, but their failure so to do and to have the deed recorded within one year after they became entitled thereto, renders the certificate and sale absolutely null and void under §133 of that act.

The appellant further contends that the court should have retained jurisdiction for the purpose of enforcing the equitable lien arising in her favor from the subsequent payment of taxes. There was no error in this ruling. A tax foreclosure is a special proceeding instituted under a special statute for a special purpose, and when the purpose fails the proceeding itself fails, and the court cannot retain jurisdiction for the purpose of granting general relief. A motion to dismiss the appeal, interposed by the respondent on the ground that the appeal was not taken within thirty days from the rendition of the final judgment, should probably be granted on the authority of *Brown v. Davis*, 36 Wash. 135, 78 Pac. 779, and *Harris v. Levy*, 39 Wash. 158, 81 Pac. 550, but an affirmance on the merits accomplishes the same result. Judgment affirmed.

PARKER, DUNBAR, CROW and MOUNT, JJ., concur.

[No. 8178. Department Two. October 29, 1909.]

FRANK HOSETH, *Respondent*, v. PRESTON MILL COMPANY, *Appellant*.[1]

MASTER AND SERVANT—NEGLIGENCE—AUTHORITY OF COSERVANT—PRESUMPTION. In an action for injuries sustained through the giving way of a swamp hook set in a stump to hold a lead line, it will be presumed, in the absence of evidence, that the hook was set by a hook tender duly authorized by the defendant.

APPEAL—REVIEW—VERDICT. A verdict cannot be set aside on appeal because of sharp conflict in the evidence.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE. An admission of evidence to show plaintiff's inexperience and failure to warn him of dangers is immaterial where it affected only the question of his contributory negligence and there was no testimony tending to show contributory negligence, and where direct and positive instructions plainly withdrew from the consideration of the jury all issues on those subjects.

MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPALS—INSTRUCTIONS. It is not error to refuse requested instructions to the effect that the jury could only find negligence from the setting of a swamp hook if the fact "was known to the defendant's foreman in charge of the plaintiff," or could have been known and remedied by the foreman by the exercise of reasonable care, where the court instructed that the defendant was not liable if it used due and reasonable care in the selection of a reasonably safe swamp hook; since a hook tender in selecting or setting the swamp hook would be performing a nondelegable duty of the master.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $5,000 for fractures of leg and arm held not excessive.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 11, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a signalman employed in a logging camp. Affirmed.

Shank & Smith, for appellant.

Vince H. Faben and *Martin J. Lund*, for respondent.

[1]Reported in 104 Pac. 612.

DUNBAR, J.—This appeal is from a judgment rendered upon the verdict of a jury in the sum of $5,000, in an action for personal injuries. This action has been in this court upon a former appeal, and is reported in 49 Wash. 682, 96 Pac. 423 where the following brief statement of the case is presented, which we will adopt:

"This action was instituted in the court below to recover damages for personal injuries. At the time of receiving the injuries complained of, the plaintiff was in the employ of the defendant in one of its logging camps, and was standing near a cable extending from the logging engine out into the forest, for the purpose of transmitting signals from the men in the forest to the engineer. In transmitting the signals, the plaintiff stood within ten or twelve feet of a large stump to which a snatch block was anchored for the purpose of holding the cable in place. The snatch block was fastened to the stump by a lead line which was wrapped one and one-half times around the stump, and a swamp hook attached to the end of the line was hooked or fastened into the body of the stump. While the plaintiff was occupying this position, the strain on the cable caused the swamp hook at the end of the lead line to give way, and the hook or line struck him, fracturing his leg and arm. The specific acts of negligence charged in the complaint were the use of a defective and inadequate hook, and the failure to securely fasten the hook in the stump. The answer denied the negligence charged in the complaint, and alleged affirmatively contributory negligence on the part of the plaintiff and negligence of a fellow servant."

The judgment was reversed for the reason that an instruction as to damages caused by a fall from crutches three months after the original injury, to the effect that plaintiff is not guilty of negligence if using the leg before complete recovery with the permission of the physician, in the absence of bad faith, and may recover for injuries incurred while walking around in good faith, is erroneous in failing to require reasonable care in the plaintiff, and is not cured by a contradictory instruction on the subject of contributory neg-

ligence. Upon a retrial of the cause, the verdict above mentioned was obtained, and judgment was entered, and the case is here again on appeal.

It is insisted that there is no evidence whatever to show who set the swamp hook at the time of the injury to the plaintiff. The hook tender, Mr. McCormick, at the time of both trials was dead. In the absence of proof, the presumption must be that, in the orderly and usual conduct of the business, the hook was set by a tender duly authorized by the defendant company. It is stated by the appellant that there is a sharp conflict in the testimony between the plaintiff and the skid-road man, the doctor and the nurses who attended him during his injuries, and other witnesses offered by the defense, and this conflict of testimony is largely set forth. With a sharp conflict of testimony, or indeed any substantial conflict of testimony, this court has no concern, questions of that kind being submitted entirely to the jury; so that it is not necessary to discuss in this opinion questions involving the conflict of testimony.

The first assignment is that the court erred in allowing plaintiff to introduce evidence, over objection, that plaintiff was inexperienced and was not warned by defendant or its employees. In addition to the fact that this affected only the question of contributory negligence, and that there is no testimony whatever tending to show contributory negligence on the part of the plaintiff, the admission of this testimony could be at least only immaterial, and not in any way prejudicial. Moreover, the court, at the request of the appellant, instructed the jury directly upon this point, as follows:

"You are instructed that plaintiff does not charge in his complaint and cannot recover for any acts of negligence and carelessness of defendant, or any of its servants, in and about any other thing, or in any other manner than that of the selection and use of the swamp hook, and the manner in which it was fastened in the stump by defendant's foreman or under his immediate supervision."

On the point raised in relation to the testimony of want of warning, introduced by the plaintiff, the court instructed as follows:

"You are further instructed that plaintiff has not charged in his complaint, and cannot recover for any act of carelessness or negligence of its foreman by reason of the failure to warn the plaintiff of any danger to which he was subjected by reason of the performance of the work he was directed to do. Even though you should find from the evidence that the injury to plaintiff was caused by the failure of defendant to warn the plaintiff of danger to which he might be subjected, yet you cannot find a verdict for the plaintiff by reason thereof."

Notwithstanding this instruction, it is insisted by the appellant that the error was not cured by said instruction. But the trial of a lawsuit cannot be conducted in every particular in exact accord with prescribed rules. Many slight errors are liable to creep in, and the best that can be done is for the court to correct the error and remedy the inadvertence as nearly as possible. In this case this attempt was made by the court, and we think that the direct, positive, and explicit instruction of the court in this case substantially cured the error committed, if error it was in the first instance.

It is also alleged that the court erred in instructing the jury as follows:

"If you shall find from the evidence in the case that the swamp hook was insecurely and improperly fastened to the stump and by reason thereof liable to give way and fall out, and to cause injury to the plaintiff, and that the plaintiff did not know these facts and could not have known them under the circumstances, by the exercise of reasonable care and caution, and that such facts were known to defendant's foreman in charge of the plaintiff, or by the use of reasonable care could have been known by him and that the foreman failed to remedy the defect and failed to have the swamp hook properly fastened and that such defect on the part of defendant's foreman was the cause of such injury to plaintiff, then you should find a verdict for the plaintiff."

As presenting the opposite doctrine, the appellant asked that the following instructions be given by the court, which was by the court refused, which refusal is assigned as error here:

"I instruct you, gentlemen of the jury, that the master owes a duty to its servant to use reasonable care to provide reasonably safe tools and appliances with which to prosecute the work undertaken, and if injury is caused to the servant by reason of the master's failure to perform that duty, and while the servant is using due care, then the master is liable for damages for injuries so caused. If you shall find from a fair preponderance of the evidence before you that the injuries to plaintiff complained of were caused by the use of the swamp hook that was too small or inadequate for the work for which it was used, and in addition thereto that defendant was careless and negligent in the selection of the swamp hook, and while the plaintiff was using due care, then your verdict should be given for the plaintiff. But you are instructed that if the defendant in this case used due and reasonable care in the selection of a reasonably safe swamp hook, then defendant has performed its entire duty which it owed to the plaintiff in this respect, and plaintiff cannot recover any damages resulting from the use of the size and the kind of hook used."

The twelfth instruction asked for contains substantially the same idea. The argument of the appellant in support of its assignments is that, when a master has used due and reasonable care in the selection of reasonably safe tools and appliances, and the furnishing of a safe place in which the servant is to work, he has performed his entire duty, and cannot be liable for any injuries arising from the conduct of his business; that it is not his duty to see that such tools are properly adjusted in the ordinary conduct of the business of the master; that it is not the duty of the master to follow every servant about and see that he does not place an instrumentality or a combination of instrumentalities, or the place, temporarily, where the servants are working, in a dangerous condition. The fault of this argument, as applied to this particular case, is that there is no question of fellow

servant involved here, or the question of the master following servants around to see that they properly use instrumentalities which are furnished to them by the master; because, under the former rulings of this court, the hook tender is the *alter ego* of the master, and therefore it is the master himself who is performing his own duty in the management of the instrumentalities employed in the performance of the work.

In the cases cited by the appellant to sustain this contention, the injury was either the result of the action of a fellow servant, or the plaintiff was engaged in work under his own control and as a representative of the master, as in the case of *Anderson v. Inland Telephone etc. Co.*, 19 Wash. 575, 53 Pac. 657, 41 L. R. A. 410. That the hook tender here was performing a nondelegable duty of the master, see *Sullivan v. Wood & Co.*, 43 Wash. 259, 86 Pac. 629, 117 Am. St. 1047; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091.

We have examined the other instructions complained of, but in the light of the whole instruction given by the court, which was extremely fair and presented every defense available under the law to the appellant with no uncertain qualifications, the instructions given being more favorable, as we view them, to the appellant than they were to the respondent, we think no error was committed in the giving or refusing of instructions.

As to the claim of excessive damages allowed, we are unable to reach the conclusion from the testimony that the verdict of the jury and the judgment of the court in this respect ought to be interfered with by this court. The judgment is therefore affirmed.

RUDKIN, C. J., MOUNT, CROW, and PARKER, JJ., concur.

[No. 8270. Department Two. October 29, 1909.]

WILLIAM BERGER, *Appellant*, v. METROPOLITAN PRESS PRINTING COMPANY, *Respondent*.[1]

MASTER AND SERVANT—NEGLIGENCE OF MASTER—APPLIANCES—FACTORY ACT—NOTICE—SUFFICIENCY. Where an employee was injured while assisting to place a belt upon a pulley, his notice of the injury stating that he came to work at 6:30 p. m. on a certain date, that one C. started the motor, the belt slipped off, C. shut off the power, and while trying to put on the belt, his hand was caught, is sufficient under the factory act, Laws 1905, p. 169, § 9, allowing recovery for failure to provide proper belt shifters, etc., if "notice of the time, place and cause of injury is given the employer within six months"; since the purpose of the law to give notice of the time, place and cause is fulfilled, and technical accuracy is not required.

SAME—NOTICE UNDER THE FACTORY ACT—ESTOPPEL TO OBJECT. Such a notice is especially sufficient to authorize a recovery under the factory act, where it was prepared at a meeting by appointment with the defendant, retained without objection, and a few days later plaintiff asked for a copy, which was refused, and the defendant did not affirmatively allege a defective notice, but merely denied the giving of any notice and misled the plaintiff as to the issue.

SAME—NEGLIGENCE OF MASTER—APPLIANCE—FACTORY ACT—EVIDENCE—SUFFICIENCY. There is sufficient evidence to make a question for the jury for failure to furnish proper belt shifters, etc., under the factory act, where a press feeder, outside of his regular employment, was injured while assisting to put on a belt which was defective, curled up at the edges, and running on crooked pulleys which tended to throw it off, and he was inexperienced and unaware of the defective conditions.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 22, 1909, upon granting a nonsuit at the close of plaintiff's case, dismissing an action for personal injuries, after a trial before the court and a jury. Reversed.

Fouts & Gould (*Milo A. Root*, of counsel), for appellant. The statutory notice in this case was sufficient. *Falldin v. Seattle*, 50 Wash. 561, 97 Pac. 658; *Ellis v. Seattle*, 47

[1]Reported in 104 Pac. 617.

Wash. 578, 92 Pac. 431; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370; *Lynch v. Allyn*, 160 Mass. 248, 35 N. E. 550; *Hardt v. Chicago, Milwaukee & St. Paul R. Co.*, 130 Wis. 512, 110 N. W. 427; *Brick v. Bosworth*, 162 Mass. 334, 39 N. E. 36; *Mulligan v. Seattle*, 42 Wash. 264, 84 Pac. 721; *Hammock v. Tacoma*, 40 Wash. 539, 82 Pac. 893; *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31; *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386; *Piper v. Spokane*, 22 Wash. 147, 60 Pac. 138; *Beauregard v. Webb Granite & Construction Co.*, 160 Mass. 201, 35 N. E. 555; *Whitman v. Inhabitants of Groveland*, 131 Mass. 553; *McCarthy v. Dedham*, 188 Mass. 204, 74 N. E. 319; *Sheehy v. New York*, 160 N. Y. 139, 54 N. E. 749; *St. Louis & San Francisco R. v. Burgess*, 72 Kan. 454, 83 Pac. 991. The company having prepared the notice was estopped. The plaintiff was not bound to plead the estoppel since he had no notice of a defense calling for such plea. Estoppel *in pais* need not be pleaded under such circumstances. *Isaacs v. Clark*, 12 Vt. 692, 36 Am. Dec. 372; *Capital Lumber Co. v. Barth*, 33 Mont. 94, 81 Pac. 994; *Shelton v. Alcox*, 11 Conn. 240; *Woodhouse v. Williams*, 14 N. C. 508; *Donnelly v. San Francisco Bridge Co.*, 117 Cal. 417, 49 Pac. 559; *Blood v. La Serena Land & Water Co.* (Cal.), 41 Pac. 1017; *Perry Bros. v. Farrimond*, 5 Ind. Ter. 59, 82 S. W. 674; *Vellum v. Demerle*, 20 N. Y. Supp. 516; 16 Cyc. 807, 808, 809. The case should have been submitted to the jury under the employer's liability act. *Hoveland v. Hall Bros. Marine R. etc. Co.*, 41 Wash. 164, 82 Pac. 1090; *Erickson v. McNeeley & Co.*, 41 Wash. 509, 84 Pac. 3; *Gustafson v. West Lumber Co.*, 51 Wash. 25, 97 Pac. 1094. The case should have been submitted to the jury on the question of common law liability. *Slacer v. Field Engineering Co.*, 4 Misc. Rep. 493, 24 N. Y. Supp. 550; *Kirby v. Wheeler-Osgood Co.*, 42 Wash. 610, 85 Pac. 62.

Kerr & McCord, for respondent, contended, *inter alia*, that the notice did not comply with the requirements of the

factory act. *Chisholm v. Manhattan R. Co.*, 101 N. Y. Supp. 622; *Gmaehle v. Rosenberg*, 178 N. Y. 147, 70 N. E. 411; *O'Neil v. Karr*, 110 App. Div. 571, 97 N. Y. Supp. 151; 5 Thompson, Negligence, §§ 6334, 6337; *Miller v. Solvay Process Co.*, 109 App. Div. 135, 95 N. Y. Supp. 1020; *Ortolano v. Degnon Contracting Co.*, 104 N. Y. Supp. 1064; *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127; *Stoors v. Denver*, 19 Colo. App. 159, 73 Pac. 1094; *Hughes v. Russell*, 93 N. Y. Supp. 307. An insufficient notice is no notice. *Mears v. Spokane, supra; Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80; *Borst v. Town of Sharon*, 48 N. Y. Supp. 996; *Wall v. Highland*, 72 Wis. 435, 39 N. W. 560; *Weber v. Greenfield*, 74 Wis. 234, 42 N. W. 101; *Miller v. Solvay Process Co.*, and *Hughes v. Russell, supra; Driscoll v. City of Fall River*, 163 Mass. 105, 39 N. E. 1003; *Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431.

DUNBAR, J.—Action for alleged personal injuries. The plaintiff was in the employ of the Metropolitan Press Printing Company as a press feeder. On the 6th day of August, 1907, he was ordered by defendant's foreman to return and help do some emergency work that night at about six o'clock. According to instructions he went, and was first put to mixing ink. Mr. Carter, the man who was working with him, started the motor. The belt came off, and Carter requested the plaintiff to assist him in helping to put the belt back on. While attempting to put the belt on, his hand was caught, and his arm torn off at the elbow. The floor, at the time where he was caught, was covered with oil. Plaintiff brought this action, and attempted to recover under the factory act, under a notice which was as follows:

"Seattle, U. S. A., Sept. 9, 1907.

"I was employed by the Metropolitan Press Printing Company on August 6, 1907. On that date at about 6:30 p. m. Dwight Carter and I came in to work. The machinery was not running, and Carter started the motor. The belt slipped off and Carter shut off the power, and we were trying to put

the belt on. The motor was still running, and I got my hand caught in between the belt and the motor pulley. The belt was in good shape and broke after my hand got caught.

"Witnesses: (Signed) Wm. Berger."
"J. A. Moore.
"J. P. Dabney.

The court held that this notice was insufficient to permit a recovery under the factory act, and the cause proceeded to trial upon the plaintiff's common law rights and remedies. At the close of the plaintiff's testimony, the court, on motion interposed by the defendant, granted a nonsuit. Judgment of dismissal was entered, and from such judgment this appeal is taken.

The assignments of error are to the effect, that the court erred in holding the notice insufficient; in refusing to permit plaintiff to amend his complaint; in its rulings upon the admission and rejection of certain testimony; in holding that matters in estoppel could not be proved under the pleadings; and in sustaining defendant's motion for a nonsuit and denying plaintiff's motion for a new trial.

We will first notice the assignment of error in regard to the sufficiency of the notice. The question of the sufficiency of notices of this character has been under consideration by this court very many times, and without again citing the particular cases decided, the announcement has uniformly been to the effect that the object of such notice was to give the defendant an opportunity to investigate and examine the place where the accident is alleged to have occurred, so that it might intelligently prepare for its defense, or compromise or settle the claim, if that was thought best, and that, when this was done, the object of the law was met and its provisions complied with. But it is the contention of the respondent that a distinction should be made between cases where the action is brought against a municipal corporation and where the claim is waged under the factory act, for the reason that the effect of the factory act is to preserve to the injured employee all of his common law rights, and that in addition thereto

it creates another cause of action which he does not have at common law; that the factory act, being in derogation of the common law, should be strictly construed; that the legislature, deeming that by the act it was about to extend the liability of the masters to their servants, thought it wise to safeguard the new liability by requiring that notice should be given to masters of accidents for which it was sought to recover compensation, but that it was only the new or extended liability that it was intended to subject to such safeguard. This, no doubt, is true; but, notwithstanding the intelligent object of the giving of notice to defendant under the factory act must have been exactly the same as the object of the law in prescribing that notice should be given to defendants who were municipal corporations, viz., that justice should be done in each instance, whether it was a common law liability or an additional liability under the statute, when once the right of recovery under the factory act is given, that right should not be so hampered with unreasonable restrictions that it cannot be made available to the party for whose benefit it was enacted. The learned counsel says that the factory act clearly provides that the notice must state the time, place, and cause of the injury, else the action shall not be maintained; that each of these is an essential ingredient in the notice, and the absence therefrom of all or any of these elements will render the notice nugatory; that, without all of them, the notice is materially defective, wholly void, and insufficient to base the statutory cause of action upon. This is undoubtedly true, but the material question is, has the provision of the statute been reasonably complied with. The act provides, Laws of 1905, p. 169, §9:

"No action for the recovery of compensation for injury under this act shall be maintained unless notice of the time, place and cause of injury is given to the employer within six months, and the action is commenced within one year, from the occurrence of the accident causing the injury,"

prescribing that the notice required shall be in writing and signed by the person injured, or some one in his behalf.

Turning to the notice given, we discover that the time is given, viz., August 6, 1907. It cannot reasonably be contended that the defendant was not notified that the place was the place of business of the Metropolitan Press Printing Company, and that the cause of the action was that the plaintiff's hand was caught, while he was trying to put the belt on, between the belt and the motor pulley. If these things appear in the notice, then the requirements of the statute have been met, and the defendant has been notified of the time, place and cause of action. The plaintiff might have stated further that the reason that his hand was caught between the belt and the motor pulley was that no belt shifter was employed by the defendant in the running of the machinery. But the statute does not require him to do this, and the demand of the statute is the measure of his duty. It is not presumed that the notice is a technical requirement, such as a bill of particulars which may be called for in the trial of the action; nor is it, we think, fair to presume that the law hedged this notice in with so many restrictions and technical requirements that a working man of ordinary education and ability would be compelled to employ a skilled attorney to prepare the notice which this law requires; nor that the notice, which is a *sine qua non* and which cannot be amended, must be construed more strictly than a technical pleading, which is presumed to be prepared by a technical lawyer, and which may be amended at any time in the interest of justice. Such is not the voice of authority or reason.

We have examined the cases which are cited by the respondent and, in our judgment, they do not bear out its contention, and when the time, place, and cause of action are specified, even under the authorities cited, such notice will be sustained. Some courts have gone so far as to hold that these notices may be contained in separate papers, provided they so refer to each other as to be taken together; and it is said by Dresser on Employers' Liability, §27, that the notice "is to be written in 'ordinary language;' that is, the party

is to use his own untutored language;" citing *Driscoll v. Fall River*, 163 Mass. 105, 39 N. E., 1003. "His own untutored language," it seems to us, is a good, strong expression, and exactly reflects the true intention of the statute. It was also held in *Kennedy v. Lawrence*, 128 Mass. 318, that although the notice is given as a basis of a claim, it need not in terms claim compensation for the injury, since that is not one of the statements which the act requires it to contain. Again, in §28 of the above cited text book, it is said:

"It has already been noted that these statements do not need to be in technical language or in any set form; the notice need not be drafted with the care of a declaration or with a view of setting out a good cause of action. 'The object of the notice is to direct attention with substantial accuracy, not with unerring precision, to the place where an accident has happened.' It is enough if the notice sets out these requisites with such fullness that the defendant is able upon investigation to discover the place and the defect."

We think the requirements of the law were met by this notice, and that no further duty in this respect was imposed upon the plaintiff. Especially is this true if the testimony which was offered by the plaintiff and rejected by the court is true, and it must be assumed to be true for the purposes of this case.

The witness offered the following proof:

"That the plaintiff was sent for by Mr. Piggott, the president of the company, to come there for the purpose of making a statement of the case, which statement he would have to make, that would be a prerequisite to bringing a suit; that he came there by appointment, and was met there by Mr. J. S. Smith and introduced; that J. S. Smith prepared this that we offered to introduce in evidence—this alleged notice—that he prepared it and that it was then signed by this plaintiff and delivered to his foreman—the defendant's foreman; that some days afterwards he went back and asked for a copy and was told by the foreman that it had been delivered to Mr. Smith, and that he would have to go there and see it, and that he went to Mr. Smith and Mr. Smith refused to let him see it."

This offer of testimony, under the objections of defendant, was refused. It is claimed by the learned counsel for the respondent that this testimony, being offered for the purpose of estopping the defendant from denying the sufficiency of notice, should have been pleaded; and it is no doubt true that ordinarily an estoppel should be pleaded. But the complaint alleged the giving of the notice, and the answer, instead of pleading a defective notice, simply denied the giving of any notice on the part of the plaintiff. While it is true, probably, that a plea of *non est factum* might avail the defendant, so far as its own defense was concerned, it would be inequitable to allow such a defense for the purpose of misleading the plaintiff, as it evidently did mislead him in this instance, the natural inference from the denial being that the issue raised by the answer and the complaint was the issue of whether any notice had been given, and not of whether a defective notice had been given. Under the circumstances shown by this offered testimony, it seems to us it would be exceedingly unjust to allow a plea of want of notice on the part of the defendant to defeat plaintiff's action under the factory act.

We also think that the court exceeded its proper jurisdiction and impinged upon the province of the jury when this nonsuit was granted. There was testimony to the effect that this was a very defective belt; that it was old and made of different pieces; that it curled up at the edges, and was running on crooked pulleys which tended to throw it off; that the defendant was aware of the defective condition of this belt, and that the plaintiff was not; that he was not engaged in his regular employment, or the employment in which he had had experience, when this accident occurred. This testimony was offered by men of experience who were seemingly disinterested witnesses, and we think there was sufficient testimony in regard to the negligence of the defendant to pass to the consideration of the jury.

The judgment will therefore be reversed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8011. *En Banc.* October 29, 1909.]

CATHERINE TOELLNER *et al.*, *Appellants*, v. IDA J. McGINNIS *et al.*, *Respondents*.[1]

LANDLORD AND TENANT—LEASES—RENT—REENTRY. Default in the payment of rents, and reentry by the landlord under process in an action for unlawful detainer, works a forfeiture of all right to rents subsequently earned.

LANDLORD AND TENANT—LEASE—COVENANTS — CONSTRUCTION. A stipulation in a lease requiring a landlord to pay the lessee for improvements, at the end of the term, is one for compensation, and the intent of the parties, construing the lease as a whole, determines whether the same is dependent upon the payment of rents, irrespective of the fact that the improvements have become part of the real estate.

LANDLORD AND TENANT—LEASE—DEPENDENT COVENANTS—IMPROVEMENTS AND RENT—FORFEITURE OR ABANDONMENT. Where a lease for a term of years, at a stipulated ground rent payable monthly with right of reentry in case of default, provides that the lessees shall erect a building which shall become the property of the lessors at the end of the term upon payment of a sum equal to two-thirds of its value, the covenant to pay rent and the covenant to pay for the building are mutual and dependent, and the lessee cannot, after abandonment or forfeiture for condition broken and reentry, recover the value of the building or any part thereof (GOSE and MOUNT, JJ., dissenting).

SAME—COMPENSATION FOR IMPROVEMENTS—FORFEITURE—PENDENCY OF ACTION. The forfeiture of the lessees' right to compensation for a building erected by them, under the terms of the lease, by reason of default in payments of rents and reentry by the landlord, is not affected by the fact that an action for unlawful detainer is pending and undetermined, where it appears that the lessees admitted their purpose to pay no more rent and did nothing in the detainer action to tender rent, protect their interests, or prevent reentry.

SAME—COMPENSATION FOR IMPROVEMENTS—ACTIONS—LIMITATIONS—REENTRY. Where a lease for a term of years, with right of reentry for nonpayment of ground rents, stipulated that the lessors should at the end of the term, pay two-thirds of the value of a building erected by the lessees, and the lease was terminated before the expiration of the term by the nonpayment of rent and reentry, an action by lessees for compensation for the building under the terms of the lease is barred by the lapse of six years after the reentry.

[1]Reported in 104 Pac. 641.

LANDLORD AND TENANT — LEASE — COVENANTS—FORFEITURE. The fact that a lease, with right of reentry for condition broken, contains no forfeiture clause, does not prevent a forfeiture of the lessees' right to compensation for improvements, upon reentry for nonpayment of rents, where the stipulation for rents and for compensation were mutual and dependent covenants.

Appeal from a judgment of the superior court for King county, Morris, J., entered September 22, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to recover the value of a building, and for the rents thereof. Affirmed.

Shepard & Flett, Lyter & Folsom, and *Smith & Cole,* for appellants.

L. C. Gilman and *Robert C. Saunders,* for respondents.

CHADWICK, J.—On July 15, 1889, defendant Ida J. McGinnis, her husband joining, leased to Isaac Percival and D. M. Shanks lot 5, block 11, D. S. Maynard's plat of the city of Seattle, for a term of fifteen years, beginning the 1st day of August, 1889. A ground rent of $200 per month, to be paid in advance, was reserved for the first five years, the rent thereafter to be $250 per month until the expiration of the term. The lease contained the following covenants:

"And it is hereby agreed that if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said parties of the first part to re-enter said premises and remove all persons therefrom. And the said parties of the second part do hereby covenant, promise and agree to pay the said parties of the first part the said rent in the manner hereinbefore specified. And said second parties covenant and agree to build and erect upon said premises a substantial brick building not less than two stories in height, costing not less than $15,000.00 and to be not less than 108 x 60 feet in size, said building to be commenced at once and completed within six months from the date hereof. And said parties hereby covenant and agree that they will at the expiration of said term

purchase of the second parties the aforesaid building at two-thirds of the then appraised value thereof,—said appraisement to be made as follows: First parties to choose one appraiser, second parties to choose the second appraiser, and the two appraisers so chosen to choose a third, and the decision of a majority of the appraisers so chosen to be final and conclusive upon all the parties hereto. And at the expiration of said term the said parties of the second part will quit and surrender the said premises in good state and condition as reasonable use and wear thereof will permit (damage by the elements excepted), and it is expressly understood and agreed that the payment of two-thirds of the value of said building at the expiration of said term by first parties to second parties shall vest the title to said building fully in first parties, either party refusing to appoint an appraiser at the end of said term shall forfeit all rights under this agreement. This lease shall apply to and bind the respective heirs, assigns, executors and administrators of the respective parties hereto."

The lessees erected a brick building on the leased premises at a cost of more than $15,000. Various changes in ownership occurred, both by voluntary conveyances and by operation of law, so that, on January 21, 1898, an undivided two-thirds interest therein was owned by Sarah E. Coulter, under an assignment of date April 30, 1897, executed by H. W. Austin, one of the plaintiffs. An undivided one-third interest was owned by E. W. Mills, subject to a mortgage executed in favor of Catherine Toellner on the 1st day of January, 1898, and for some time prior thereto the property was in the immediate possession of C. M. Austin as agent, with authority to manage and collect the rents for Sarah E. Coulter. On that day defendants began an action against H. W. Austin, E. W. Mills, Catherine Toellner and the tenants in said building, alleging that there was rent due from said defendants to plaintiffs, and that they had also breached the contract in that said plaintiffs had been compelled to pay the sum of $730.04 taxes which had accumulated; and praying for a provisional writ of restitution, that they have judgment for the rent, and that the lease be forfeited. On the

same day they executed a statutory bond, the writ issued, and defendants here, Ida J. McGinnis and her husband W. W. McGinnis, were put in possession of the premises, and have ever since remained in possession and collected all the rents. On October 1, 1898, H. W. Austin filed an amended answer in that case, wherein he disclaimed any interest in the property, and set up the interest of Sarah E. Coulter, his assignee. The default of the other defendants, with the exception of Catherine Toellner, was entered on February 7, 1898.

Just prior to the commencement of the action for unlawful detention, C. M. Austin, the agent in charge of the Coulter interests with authority to collect the rents, told the attorney of these defendants that he would pay no more ground rent or taxes on said building, and, prior to the commencement of the action, E. W. Mills made a like statement to the same party. On October 31, 1898, Sarah E. Coulter, claiming an interest in the lease and property, paid into court the sum of $231.80 as rents and costs, and thereafter, in the fall of 1898, paid in the additional sum of $34, making a total of $265.80, which was the full amount of rents and interest due at the time of the commencement of the unlawful detention action, and costs up to the time of payment, which sum still remains in the registry of the court. At that time she asked leave to intervene. Her petition, coming on for hearing before the court, was denied. She reserved exceptions, but no appeal or further proceedings were taken or had by her. Thereafter she reconveyed all her interest, if any, to H. W. Austin, plaintiff herein.

On March 10, 1902, Catherine Toellner, who in the meantime had foreclosed her mortgage (these defendants were not made parties) and bought the interest of Mills, if any, filed a demurrer in the unlawful detention case, and afterwards filed an answer to the complaint in the original action. No judgment was taken in that case against either Sarah E. Coulter, Catherine Toellner, or E. W. Mills. From the time

the writ of restitution issued until July 31, 1904, the end of the fifteen-year term, the net rents of the leased premises amounted to $25,292.77, without deducting the $732.04 taxes alleged to be due at the time of the commencement of the possessory action. The ground rent, which would have been due and paid had the contract been carried out, would have amounted to $19,500. The lower court found the building to be worth at this time the sum of $15,000. On August 15, 1904, Catherine Toellner and H. W. Austin served notice on these defendants that they had selected M. J. Carkeek as their appraiser, as provided in the lease, and demanded that they likewise appoint an appraiser in order that their respective interests in the leased building and appurtenances might be determined. Catherine Toellner and H. W. Austin began separate actions to recover the two-thirds value of the building, and for rents less the ground rent. These actions were consolidated by order of the court. The consolidated case was referred to a referee, who heard the testimony and reported the facts which we have summarized. No exceptions were taken to the findings of fact by either party, and the court made conclusions of law and decreed that plaintiffs take nothing, and dismissed their action. From this decree, plaintiffs have appealed.

Appellants summarize their several assignments of error under two heads:

"First. The right of plaintiffs, under the terms of the lease quoted, to recover two-thirds of the value of said building at the date of the expiration of said lease.

"Second. The right of plaintiffs to recover the difference between the stipulated rent, from the date of the entry under the writ to the 31st day of July, 1904, and the amounts actually collected by the defendants between said dates, to wit, $5,792.77, as found by the referee."

Reference to the lease will disclose the main question raised by appellants, and, as we view the case, the only question to be decided by us. It is asserted that the covenant to pay

rent with the right of reentry in case of default, and the covenant to erect a building and to pay two-thirds of its value after the full term, are independent of each other, and although the parties may have defaulted in the payment of rent, they are not precluded from recovering the value of the building. On the other hand, respondents insist—and the lower court so held—that they are not entitled to recover on the second covenant unless the first be fully performed; that appellants abandoned, surrendered, and have forfeited all their interests in the lease and their right to recover the value of the building. Whichever be the correct view of the law, we are of the opinion that the default in rent and reentry, under the terms of the lease, work a forfeiture of all right to rents subsequently earned. We must presume that they had no defense to the unlawful detention action, and none is now urged. It is one of the hardships of the law that a right voluntarily foregone in the hour of adversity cannot be reasserted when prosperity has made the right a valuable one. We shall, therefore, pass this point without further discussion.

That it is the duty of a court to construe a contract as a whole, if it is possible to do so, will, we apprehend, be admitted as the general rule. However, if the covenant relied on be in fact independent, it is no defense to this action to say that appellant had defaulted in the payment of rent. It is urged, in support of the theory, that the covenant relied on is independent, and that the parties have put their own construction upon it by providing that the title to the building shall remain in the lessees until the end of the term. The lease says:

"It is expressly understood and agreed that the payment of two-thirds of the value of said building at the expiration of said term by first parties to second parties shall vest title to said building fully in first parties."

It must also be admitted that the right to remove improvements or exact pay therefor, after the term, depends entirely upon the contract of the parties and was unknown to the

common law—"a strong invasion upon it," as has been aptly said. There is another fundamental principle that suggests itself as an added premise for our argument, and that is that, whatever may be the form of the contract or manner of stating it, the building becomes, as it is erected brick by brick and stone upon stone, a part of the land. So that, after all, from the very nature of things, the question is not a question of title reserved in the lessee, or the right to maintain title on the part of the lessor, but primarily a question of compensation; a right, if any, to recover the value of the building or declare a lien and enforce it as an equitable remedy. When so considered, the only question remaining is whether, under all the facts, appellants are entitled to such compensation. A similar contract was before the court in *Kutter v. Smith*, 69 U. S. 491, 17 L. Ed. 830, wherein it was held that, in the absence of a covenant to remove within the term, the contract did not change the rule that the building became a part of the land and the title was in the lessor. To the same effect is *Bass v. Metropolitan West Side El. R. Co.*, 82 Fed. 857. In the case of *California Annual Conference of the M. E. Church v. Seitz*, 74 Cal. 287, 15 Pac. 839, the owner undertook to defeat his agreement to purchase improvements put upon the land by his lessee under a contract providing that he should take them at an appraised value at the end of the term, by setting up the fact that the lessee had assigned and sold his interest in the lease to another; that that part of the contract wherein he had engaged to pay for the improvements was independent of the other parts of the lease, and was not affected by the contract of the lessee who had sold all of his right, title, and interest in and to the lease; in other words, that the form of the assignment was insufficient to carry any interest in the property, so that the assignee might recover its value. The court held that it was a whole contract; that whatever the original parties may have called their engagement, it was nevertheless a contract, and to be construed in

a practical way to meet the intent of the parties. In Jones on Landlord & Tenant, § 324, it is said:

"Covenants in an agreement will be construed as conditions precedent or as independent agreements, according to the intention of the parties and the good sense of the case, and technical words must give way to such intention. Therefore, in determining how to class covenants, the safest and best course is to ascertain what was the intention of the parties from the instrument they have executed, and then to give the covenants such a construction as will carry this intention into effect. If it appears, on the whole, that any substantial part of the agreement on one side is to be performed only on condition of performance on the other, the court is bound to construe the covenants accordingly, whatever may be the order in which they are placed in the instrument or the manner in which they are expressed."

Sighting, then, along the full length of the barrel of the contract, it would seem that it was the intention of the original parties to make a covenant to pay for the building dependent upon the covenant to make the rent return for the land. The primary object sought to be obtained by the lessors was, no doubt, rent returned, payable monthly for the full term, and by the lessees the use of the ground for which, in addition to the rent, they were willing to advance the cost of a building and receive at the end of the term two-thirds of its value. This being the manifest intent of the parties, it would be unjust to hold that the one party was bound to the letter of the bond and the other could repudiate the contract which for the time may have become onerous, putting upon the lessor the burden of maintaining a property, possibly unproductive, as well as the payment of added taxes by reason of the structure, and abide the lapse of time when they could claim performance on the part of the lessors. To so hold would put it in the power of the lessee to withdraw when the tide of prosperity ebbed, and reassert a right when the tide flowed in. The one promise would not have been made unless the other had been undertaken. They were mutual and de-

pendent. Respondents did not agree to buy a building in any event, but agreed to lease the land *and*, after a certain term with rent reserved and paid, to buy the building. The contract was entire in the beginning; it must be so in the end. The fact that its performance may work a hardship does not make a covenant independent. That is not the test.

An engaging argument is made against the doctrine of forfeiture, and our attention is called to the duty of the court to so construe the contract that a forfeiture will not occur if it be susceptible of two constructions, and to the further fact that there is no forfeiture clause in the contract. We would be glad to so hold if we could see our way clear to say that there is room for two constructions. The fact that there is no forfeiture clause in the contract is not conclusive of the rights of the parties. By the terms of the contract respondents had the right to reenter in case of default in rent, without any engagement to account for the rent or profits thereafter accruing, and whatever the phraseology of the contract may be, if our theory be correct, a forfeiture resulted. Or, if another term be softer, the lease and all defendants' rights thereunder were voluntarily surrendered. The meaning of the covenant to purchase is that the lessors will pay for the building in a certain event—the payment of the rent for the term. There is nothing in the findings of fact that raises any considerations of equity. It is true that, in a given case—possibly in this one, time may work out a condition where the application of the rule works a hardship on the lessees. But for that condition they alone are responsible. The law, as well as their contract, puts the duty of foreseeing it upon them. That another takes the fruit of their labor is attributable to their own fault, and the law cannot relieve them. *Kutter v. Smith, supra; Switzer v. Allen*, 11 Mont. 160, 27 Pac. 408; Jones, Landlord & Tenant, 376, 716; Taylor, Landlord & Tenant, 335a, 551; *Bates v. Johnston*, 12 N. Y. Supp. 403; *Lawrence v. Knight*, 11 Cal. 298.

As against this position appellants cite, among others, the

cases: *Butler v. Manny*, 52 Mo. 497; *Knight v. Orchard*, 92 Mo. 466, and *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586. The first of these cases probably sustains appellants' contention; the second, notwithstanding the expression, "Plaintiffs promised to compensate the lessee for such permanent improvements as he should erect on the premises, and she could not avoid this obligation by declaring a forfeiture of the lease for nonpayment of the rent," did not involve the exact question with which we are dealing. The question was whether the lessee was bound to pay certain taxes at the time the forfeiture was declared. The court held he was not, and therefore no forfeiture could result because of it. Beyond this the opinion cannot be taken as controlling. *Crampton v. McLaughlin Realty Co.* has nothing in common with this case. The covenants in that contract were clearly independent under any rule. As said in that case, "It is sometimes difficult to determine whether covenants are dependent or independent." We must, therefore, as suggested by Mr. Jones, look to the true intent of the parties to be gathered from a consideration of the whole contract.

The point is also made that the unlawful detainer case is still pending, and the rights of the parties should be measured by that. Appellants or their grantors had their remedy. They might have given a counter bond or protected their interests under the law. They might have tendered the rent due and claimed the term. They did nothing. They admitted their purpose to pay no more rent. They put respondents to their remedy at law, and the further proceedings in that case can be of no consequence to them in this.

"The right of the tenant depends altogether upon his faithful performance of his covenants, and it is difficult to see how his present refusal to pay the rent reserved by the leases puts him in position to enforce covenants of his landlord, which by the provisions of the leases are to be performed *in futuro*, and then only upon his having kept the covenants, which he concedes he has broken." *Paine v. Rector etc. of Trinity Church*, 7 Hun 89.

The argument is also made that the actions were not begun within the proper period of limitation. This point is also well taken. Although the contract provides for a fifteen-year term, this time was stipulated on the theory that each party would abide by and perform the contract for the full term. But the gist of the promise to pay for the improvements is that the lessors would pay when they took possession. This they did in January, 1898. These actions were begun in 1905, more than six years after respondents had taken possession, and were therefore, if we could find that appellants had a right of action at all, barred by the statute of limitations.

The conclusions of law drawn by the trial court were well founded. Judgment affirmed.

RUDKIN, C. J., DUNBAR, PARKER, FULLERTON, and CROW, JJ., concur.

GOSE, J. (dissenting)—I think that the covenant of the lessees to pay rent and the covenant of the lessors to pay for the building are independent of each other. I therefore dissent.

MOUNT, J., concurs with GOSE, J.

MORRIS, J., took no part.

[No. 8412. Department One. November 2, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Frank Roberts, Plaintiff*, v. M. L. CLIFFORD, *Judge etc., Respondent.*[1]

APPEAL—STATEMENT OF FACTS—MANDATE TO COMPEL CERTIFICATION. The supreme court can by mandate require the trial judge to settle and certify the statement of facts when the time arrives for the performance of such statutory duty.

SAME—STATEMENT OF FACTS—CONTENTS—SETTLEMENT—DETERMINING FACTS. The trial judge cannot require that the entire transcript

[1]Reported in 104 Pac. 631.

of the reporter's minutes be embodied in a statement of facts to which no amendments are proposed, because of his inability to decide upon its accuracy without a complete transcript of the reporter's minutes, since it is a duty devolving upon him to examine the statement and determine from his own judgment whether it contains "all the material facts, matters, and proceedings" theretofore occurring in the cause and not a part of the record, and if it does not, to require their insertion.

Application filed in the supreme court October 18, 1909, for a writ of mandamus to compel the superior court for Pierce county, Clifford, J., to settle and certify a proposed statement of facts. Writ granted.

Teats, Metzler & Teats, for relator.

B. S. Grosscup and *W. C. Morrow*, for respondent.

MORRIS, J.—Application for writ of mandamus, directed to the respondent, requiring the settlement and certification of a statement of facts, in an action tried before the respondent, resulting in judgment against relator and an appeal to this court. It appears that, on June 24, 1909, the relator filed and served his proposed statement of facts; that on June 25, counsel for the prevailing party filed objections to the proposed statement, upon the ground that the same did not contain all of the evidence, and all of the records in the cause, and moved to amend the same by including all of the evidence and all of the record, as the same were had and done at the trial of the cause. This motion was granted on July 3. On July 10, relator called up for hearing his application for certification of the proposed statement, which was heard on September 4, the respondent refusing to certify or settle a statement of facts because a transcript of all the evidence had not been included therein; nor did the same contain all of the record and proceedings had upon the trial of the cause. No amendments were proposed by counsel for the prevailing party, within ten days or at any other time, and his attitude seems to be as expressed in his motion of June 25. The respondent appears here and returns as his reason

for his refusal to settle and certify the proposed statement of facts:

"That the same did not contain all the testimony nor all of the material matters and proceedings had in the cause, nor did it contain the ground of respondent's ruling upon defendant's motions, which were presented for his decision, as the same were set forth by this respondent at the time of the trial, but that it was merely a skeleton draft of the testimony in the case . . . and respondent could not tell whether it was accurate or correct as far as it went, unless he had a transcript of the court reporter's record of the proceedings had at the trial to compare it with."

Inasmuch as it is, under our practice, the duty of the court below to settle and certify a statement of facts, when under the statute the time has arrived for such settlement and certification, this court may, and should, by its mandate compel the court below to perform its statutory duty. It will not do for the court to say it does not know whether the proposed statement of facts is accurate or not. The law assumes that the court does know, and requires that he shall know. As a matter of fact such assumption may be a fiction, but it is a fiction of the law and must be given full effect. Manifestly, then, when a proposed statement of facts is presented to the court for settlement and certification, it is the duty of the court to examine it and ascertain whether or not it contains, in the language of the statute, "all the material facts, matters and proceedings heretofore occurring in the cause and not already a part of the record therein, or such thereof as the parties have agreed to be all that are material therein"; and if in his judgment it fully meets such requirements, he should so certify it. If in his judgment it does not meet such requirements, and material facts and matters are omitted therefrom, the court should order their insertion, and when so inserted make its certificate accordingly. If, however, this order of the court be not complied with, the statement may be stricken. *State ex rel. Fowler v. Steiner*, 51 Wash. 239, 98 Pac. 609.

The court may not say he does not know, and only can know when the entire transcript of the evidence and proceedings as taken by a stenographer at the trial are embodied in the statement as a part thereof. This would be, in effect, the substitution of the stenographer's judgment as to what was the evidence and procedure for that of the court's, and while doubtless the courts may safely rely upon the stenographer obtaining and presenting a correct transcript of the proceedings, it is nevertheless the duty of the court to examine it until it is satisfied that it is such a true record, and in such examination the court must rely upon its own judgment and memory of the proceedings, and not upon that of the stenographer. The court, therefore, may not require the embodiment of the entire transcript as made by the stenographer, upon the ground that only in such embodiment may he know that the statement contains all the material facts. He should require the party proposing a statement of facts to embody therein "all the material facts," whether such a requirement means less or more than may be shown by the stenographer's transcript; and in so requiring, the court must itself, from its memory or other aids which it may properly employ for such a purpose, determine when the proposed statement is sufficient. The court below was, therefore, wrong in requiring relator to make the entire transcript a part of his proposed statement, for the reason that it could only then know that the same was a proper statement. The court should, if in its judgment the statement omitted certain material evidence or proceedings, order the insertion thereof in the record, and continue so to order until it could properly make its certificate in the language of the statute.

The writ will issue directing the respondent to vacate the order of July 3, 1909, with instructions to proceed thereafter as indicated herein.

Rudkin, C. J., Chadwick, Fullerton, and Gose, JJ., concur.

[No. 8228. Department One. November 2, 1909.]

JAMES HENRY, *Appellant*, v. SEATTLE ELECTRIC COMPANY, *Respondent*.[1]

STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY. It cannot be said as a matter of law, that the driver of a heavy meat wagon with a slow team is guilty of contributory negligence in driving upon a street car track to pass a wagon, thinking he had time to make the turn before the arrival of a street car which he saw approaching one block away, but the reciprocal duties of the driver and the motorman present a question for the jury.

EVIDENCE—DECLARATIONS—RES GESTAE. In an action for damages to a team and wagon in a collision with a street car, a statement made by the conductor of the car on the return trip, three-quarters of an hour later, that the motorman was "green at the business," is an incompetent expression of an opinion, in no way explaining or characterizing the main fact, and hence is inadmissible as res gestae.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 11, 1909, dismissing an action in tort, upon granting a nonsuit, after a trial before a jury. Reversed.

Graves & Murphy and *Charles H. Winders*, for appellant.

James B. Howe and *Hugh A. Tait*, for respondent.

MORRIS, J.—Action to recover damages for injuries to appellant's horse, wagon, and harness, received in a collision with respondent's car. Judgment of nonsuit, and appeal taken.

The negligence charged in the complaint was defective car, incompetent motorman, and excessive speed. The evidence showed that, on the day of the injury, an employee of appellant was driving a meat wagon, to which was attached a heavy, slow team. The wagon was a large, covered affair, such as is ordinarily used by wholesale meat dealers in

[1]Reported in 104 Pac. 776.

making deliveries to their customers. It was proceeding east on Pike street, Seattle, and at the intersection of Broadway turned south, in order to pass a lumber wagon headed west on Pike. The driver of appellant's wagon testified it was necessary for him to drive upon respondent's track, intending to drive south on the west side of Broadway, after passing the lumber wagon, which was standing on the west side of Broadway between the car track and a watering trough. As the driver of appellant's team and wagon reached the intersection of the two streets, he looked north and south on Broadway, and saw a car just leaving Pine street, one block north. Thinking he had time to make the turn before the car reached him, he endeavored to do so, and while in the act, the car collided with the wagon, and the injuries complained of resulted.

From Pine to Pike on Broadway is a descending grade, and the driver testified that, as the car reached the center of the block, it had attained a speed of about twenty miles an hour; that he had no whip, but endeavored by urging to hurry the team, but being a heavy, slow team, he could not hurry them fast enough to make the turn before the car reached him. He also testified to a conversation with the motorman in which the motorman said: "The car got away from me coming down the hill." The only other witness testified that the car was traveling at a speed of fifteen or eighteen miles an hour when it reached Pike street. In ruling upon the nonsuit, the court found the driver guilty of contributory negligence. As indicating the court's view, we set forth his language as found in the record:

"The law is that, where a man sees a car even a block away and drives on the track and is hit by the car, he is guilty of contributory negligence to such an extent that he cannot recover."

Such is not a correct statement of the law, and the granting of the nonsuit was error.

Respondent in its brief states that the court below fol-

lowed the rulings of this court in *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Helber v. Spokane St. R. Co.*, 22 Wash. 319, 61 Pac. 40; *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839. And upon the authority of those cases the judgment, it is urged, should be sustained here. Upon an examination of those cases, it will be seen they are not analogous. In the *Criss* case, the car was seen a block away; the team was driven diagonally across the track, without again looking to observe where the car was; it was so dark the motorman could not see the team until he had approached within thirty or forty feet of them, while the lighted car was at all times in full view. In the *Christensen* case, the team was driven upon the track so close to the approaching car that, in the language of the driver, it struck him "almost instantly." In the *Coats* case, it was a dark night; the car was last seen fifty or sixty yards away, while the driver was upon the westbound track. Without again looking, but assuming the car would stop at an intervening street, Coats drove upon the eastbound track in front of the car. In the *Helber* case, the crossing was attempted without any endeavor to locate a car. In the *Davis* case, an interurban electric train was seen "a block or less away," upon the last look, and the crossing attempted without again looking.

The only similarity between any of these cases and the one at bar is that the car was seen a block away. Where several facts are involved, cases must have more than one fact in common before they can be said to be analogous or controlling, and to lay down such a broad rule as to say that a teamster is guilty of contributory negligence who attempts to make a turn upon a track, with a car known to be approaching him a block away, is to go beyond any authority in this state, and if there be any such elsewhere, we are not disposed to follow it. When a team is driven upon a street

car track with a car approaching a block or less away, the driver and the motorman assume each a reciprocal duty; the one must use ordinary prudence to avoid receiving injury; the other must use ordinary prudence to avoid inflicting injury. And when injury is inflicted, it is ordinarily for the jury, under proper instructions, to say who has neglected the duty and who has been guilty of the negligence. And it is only when, as in the cases above cited, the situation as to negligence is so plain, clear, and unequivocal as to admit of but one answer, that the court may declare negligence as a matter of law and enter a judgment of nonsuit. There was in this testimony sufficient evidence to submit the controlling questions to a jury, as questions of fact. *Snowdell v. Seattle Elec. Co.*, 54 Wash. 323, 103 Pac. 3; *Baldie v. Tacoma R. & Power Co.*, 52 Wash. 75, 100 Pac. 162; 27 Am. & Eng. Ency. Law (2d ed.), 70; *Keefe v. Seattle Elec. Co.*, *post* p. 448, 104 Pac. 774.

In view of the fact that the conclusion we have reached necessitates a new trial, there is one other question in the case that must be disposed of. The driver of the wagon testified that, before leaving the scene of the collision, the car returned from the end of its run. He could not state the exact time of the return; says, "it wasn't such a long time"; "it may have been three-quarters of an hour, or something like that"; that he then had a conversation with the conductor of the car. When asked what the conductor said, an objection was made by respondent upon the ground that it was not part of the *res gestae*. This objection was overruled, and the witness answered:

"He got off the car and he come over to me and he says: 'Were you hurt?' I says, 'I was not.' He says, 'You come out lucky.' I told him I thought I did. He says, 'This motorman is green at the business.' "

Respondent then moved to strike the answer upon the ground "that the question and answer were incompetent, immaterial and irrelevant, and not a declaration made at the

time of the accident, but was hearsay and the expression of an opinion, and made by one not having authority to bind the defendant." This motion the court granted, and instructed the jury to disregard the answer as made by the witness. In order to be a part of the *res gestae*, the subsequent declaration must explain or in some way characterize the main fact. It must not be the narration of a past event, nor the expression of an opinion. In the evidence before us, the words of the conductor did not form part of the main transaction; nor did they in any manner qualify or explain any act of the driver of the wagon, or the employees of respondent at the time of the happening of the accident. It was nothing more than an expression of an opinion which was in no sense competent, and was properly stricken.

The judgment is reversed, and the cause remanded for new trial.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8104. Department One. November 2, 1909.]

THOMAS KEEFE, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY. The driver of an express wagon is not guilty of contributory negligence as a matter of law, in driving upon a street car track in a crowded street in a populous city, after seeing a car half a block away approaching on a slight down grade at the rate of three or four miles an hour.

SAME. It is not contributory negligence, as a matter of law, to stop upon the street car track to await the passing of teams blocking the way, while a car some distance away is approaching at the rate of three or four miles an hour; since the driver may assume that the car is under control, and the reciprocal duties of the driver and motorman raise a question for the jury.

[1]Reported in 104 Pac. 774.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered September 19, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by the driver of a wagon through a collision with a street car. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

E. B. Cresap and *Higgins, Hall & Halverstadt*, for respondent.

CHADWICK, J.—On January 23, 1907, defendant, who was a driver of an express wagon in the city of Seattle, attempted to drive east across First avenue at the intersection of King street. Appellant maintains and operates a double track of street railway along the full length of First avenue, which is one of the principal business streets of the city and is used by a large number of pedestrians and vehicles. The east track was the out-bound track, and the appellant had nearly crossed the west track on which the car was approaching, when his progress was impeded by a string of five or six dirt wagons passing on the east side of First avenue. As respondent approached the crossing, he saw the car at Jackson street, one block north, and it was about a half a block away when he drove on the track. He could also see the approaching dirt wagons. The conductor and motorman estimated the speed at which the car was running at from three to four miles an hour. While the wagon was standing on the track, the car collided with it, and respondent was thrown onto the fender of the car, from which he suffered an injury. From an adverse verdict, the company has appealed, alleging that defendant was guilty of contributory negligence.

The following cases are relied upon: *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018; *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Coeur d'Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839. While it is true

that quotation may be made from each of these cases that would seem to sustain appellant's contention, we cannot overlook the fact that in all cases of this character the law must be drawn to fit the circumstances of each particular case. The court had occasion to review and explain these decisions in a recent case wherein the facts are almost identical with the case at bar—*Snowdell v. Seattle Elec. Co.*, 54 Wash. 323, 103 Pac. 3—the only material difference being that in that case the car was approaching on an up grade, while here there was a slight down grade. It was there held:

"We cannot say, as a matter of law, as contended for by appellant, that a person approaching a street railway crossing on a busy street in a populous city, seeing a car approaching on an up grade at the ordinary rate of speed, half a block away, is guilty of contributory negligence to such an extent as to bar his recovery, in assuming that he can make the crossing in safety. Whether such was the act of an ordinarily prudent man under like circumstances was for the jury, and their findings upon that question will not, under circumstances such as these, be disturbed."

It is true that the motorman and others testified that the car was beyond his control because of the slippery condition of the track, but there was a conflict of evidence upon this question, and the effect of the verdict is that the car might have been stopped before the collision.

While the evidence might well have justified a verdict against respondent, the jury has foreclosed the right of appellant to assert that the negligence of the motorman, who saw respondent in his then situation and more than a half a block away, was not the proximate cause of the injury. Appellant assumes that, because respondent stopped on the track, he was negligent, or at least that the negligence of the parties being equal, he cannot recover. Negligence is a relative question, and the conduct of respondent must be measured with the line of ordinary prudence. As intimated in the *Snowdell* case, what might be negligence where traffic was light or in a rural district or in the nighttime, cannot

be made the standard where the accident occurs in a crowded city street in broad daylight. The facts declare the law in such cases. *Ex facto jus oritur.* In cases such as we have here, the proximity or remoteness of the car, its speed, the time of day, the condition of the track, the clearance or congestion of the street, are all circumstances to be considered. For, if the rule was that a party had no right to drive on or over a street railway track if he could see a car approaching, he could never attempt to cross a track in a crowded part of the city. This rule would operate to deprive the individual and the driver of a vehicle of his equal right to the use of the street, and give a street car company an absolute right of way. *Philbin v. Denver City Tramway Co.*, 36 Colo. 331, 85 Pac. 630; *Denver City Tramway Co. v. Martin* (Colo.), 98 Pac. 836.

The duties of the motorman and the driver of a vehicle being reciprocal, it all comes down to the question of ordinary care under the given circumstances. Ordinary care on the part of the motorman means that degree of care which men of ordinary prudence and skill engaged in like work would exercise under similar circumstances; while ordinary care on the part of the driver means that degree of care which a man of ordinary prudence, driving a wagon engaged in like work and under the same or similar circumstances, usually exercises for his own safety. *Louisville R. Co. v. Boutellier*, 33 Ky. Law 484, 110 S. W. 357. It, therefore, cannot be said, as a matter of law, that one who drives upon or across, or by reason of passing teams is compelled to stop on a street railway track, the approaching car being at some considerable distance, is guilty of such negligence as a matter of law as will preclude a recovery. The driver has a right to assume that the car is under control, or will be controlled, when the motorman sees him upon the track, and that he will not run into him. It is for the jury to say whether he or the motorman was guilty of that negligence—the last effi-

cient cause—but for which the accident would not have happened. The following late cases, making due allowance for difference in speed of cars, etc., square with these conclusions: *Hall v. St. Louis & S. R. Co.*, 124 Mo. App. 661, 101 S. W. 1137; *Cole v. Metropolitan St. R. Co.*, 121 Mo. App. 605, 97 S. W. 555; *Indiana Union Traction Co. v. Pheanis* (Ind. App.), 85 N. E. 1040; *Deitsch v. Trans. St. Mary's Traction Co.*, 155 Mich. 15, 118 N. W. 489; *Adams v. Union Elec. Co.*, 138 Iowa 487, 116 N. W. 332; 2 Thompson, Negligence, 1387; 3 Elliott, Roads, 1095. And the following Washington cases: *Burian v. Seattle Elec. Co.*, 26 Wash. 606, 67 Pac. 214; *Baldie v. Tacoma R. & Power Co.*, 52 Wash. 75, 100 Pac. 162; *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Henry v. Seattle Elec. Co.*, *ante* p. 444, 104 Pac. 776.

As has been said, the facts speak the law in each case, and it does not follow from what we have said that a person has a right to go blindly upon a track when a car is so near that his attempt must necessarily result in a scramble for the right of way. Reciprocal duty means that each party is bound to use ordinary care, having due regard for the rights of the other, taking into consideration the ability or inability of either party to give way to the other.

"It would be inexpedient to attempt any complete enumeration of the modifications of or exceptions to the general rules of equality of rights between street cars and other vehicles used on a street. But it is certain that there is no modification or exception that relieves a street railway company from exercising, at least, as much care to avoid collisions with other vehicles as the owners of the latter are required to exercise in order to avoid collisions with the cars." *Shea v. St. Paul City R. Co.*, 50 Minn. 395, 52 N. W. 902.

So, as the duties of the driver of the vehicle and the street car company are reciprocal, one has no absolute right of way over the other. They are bound to share the delays and annoyances incident to congested traffic.

There was some testimony to sustain the verdict, and finding no error in the record, the judgment is affirmed.

RUDKIN, C. J., GOSE, MORRIS, and FULLERTON, JJ., concur.

[No. 8160. Department One. November 2, 1909.]

ALEXANDER PANTAGES, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

EVIDENCE—OPINIONS—ADMISSIBILITY. It is error to permit a witness to give his opinion as to the competency of a person to drive an automobile, as the jury is capable of drawing the proper inferences from a statement of the facts.

STREET RAILROADS—COLLISION WITH AUTOMOBILE—NEGLIGENCE—INSTRUCTIONS. In an action for damages from a head-on collision of a street car and an automobile, it is error to refuse to give an instruction to the effect that the motorman had a right to assume, until the danger became imminent, that the automobile would turn off the track, where there was evidence that the automobile was skidding on slippery rails, that the driver could have stopped it any time within one hundred feet of the car, but took the chance of guiding it off and made no effort to stop until within ten or twelve feet of the car, especially where there was evidence that the car had come to a full stop before the collision.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages sustained through the collision of an automobile and a street car. Reversed.

James B. Howe and *Hugh A. Tait*, for appellant.

John E. Ryan, for respondent.

CHADWICK, J.—Defendant owns and operates a double track street railway on Pike street in the city of Seattle. Pike street runs east and west. On December 3, 1907, there

[1]Reported in 104 Pac. 629.

was an excavation extending along the north side of the street. This excavation was made for the purpose of laying water pipes. On the south side of Pike street, where the travel east was accustomed to go, the water pipes thereafter to be laid were strung out. Mrs. Pantages, the wife of appellant, was driving a seven-passenger automobile in which her husband, her child, her chauffeur, and two others were riding. She came onto Pike street from Harvard avenue, and started west, taking the north or westbound car track. From this she turned onto the south or eastbound car track for the purpose, as she says, of allowing the westbound car to pass the automobile. Without stopping, she proceeded on her way west. By reason of the nature of the improvements mentioned, the tracks were slippery, and her car refused to obey her efforts to swing back to the westbound track. It skidded down the rails toward the approaching car, with which it collided at a point about midway between Terry and Boren avenues. Mrs. Pantages made no attempt to stop the automobile, other than to use the footbrake, apparently relying upon her ability to guide it off the track, until she was within ten or twelve feet of the street car, when she says she put on the emergency brake and stopped the automobile. She admits that she could have stopped it at any point within one hundred feet of the car. Plaintiff also testified that he stood up in his seat when about fifty feet distant, and shouted and waved at the motorman to stop, but that he did not heed the warning. The automobile was thrown into the ditch, plaintiff was slightly injured, and to recover for the damages to the machine and to himself, this action was brought, resulting in a verdict in favor of plaintiff. Defendant has appealed, alleging as error that the court erred in overruling a motion for a nonsuit and refusing to direct a verdict, and denying a motion for judgment *non obstante veredicto;* that the court erred in permitting one Ira D. Lundy to testify that Mrs. Pantages was a careful and capable driver; in refusing to give a number of requested

instructions; in overruling a motion for a new trial; and in rendering judgment against appellant and in favor of respondent.

We think there was evidence warranting the submission of the case to the jury, and this disposes of all the assignments of error going to that phase of the case. The assignment that the court erred in permitting the witness Lundy to testify as to Mrs. Pantages' competency as a driver of automobiles is well taken, and falls squarely within the rule announced in the very recent case of *Johnson v. Caughren, ante* p. 125, 104 Pac. 170, wherein other decisions of this court were reviewed, and the rule was finally declared in the following words:

"In the case at bar, any witness having an opinion on the question of incompetency of Ferguson to perform the duties for which he was employed, must have acquired it from observing his conduct, manner and actions while in the performance of his work, or from knowledge of his experience or lack of experience. These matters could be related to the jury by the witnesses substantially as they were observed by the witnesses, and the jury was just as capable of drawing just inferences from them as were the witnesses themselves. This being so, it was the province of the jury to draw the inference, and it was error to let the witnesses draw it for them."

In this case the witness testified as follows:

"Q. Had you occasion to see anything of Mrs. Pantages' work? A. Yes, sir. Q. In handling an automobile? A. A number of times. Q. What can you say about her being a competent, careful driver? A. It was common talk that she was one of the best drivers— Mr. Tait (interrupting). Wait a moment. Q. (Mr. Ryan) You can't tell that. A. It is my judgment that she was one of the best drivers in the garage. Q. Careful? A. Careful. Q. And capable? A. Capable."

It will thus be seen that this case is controlled by the *Johnson* case, and the question of Mrs. Pantages' contributory negligence in the particular instance cannot be meas-

ured by the opinion of third persons as to her general competency.

The court was requested to give the following instruction:

"You are instructed that if you find that the motorman saw the automobile upon the track and there was nothing to obstruct the view of the occupants of the automobile of the approaching car, such motorman had a right to assume that the automobile would be turned off of the track and out of danger in time to avoid a collision, and the motorman had a right to indulge in such assumption until the danger of a collision became imminent."

This requested instruction clearly states the law of the case and should have been given. The right of the motorman to assume that one approaching on the track would move out of the way, until the danger becomes imminent, is nowhere covered in the court's instructions. Negligence is not to be presumed, and until the jury is satisfied by a preponderance of the evidence that the situation and extremity of another was such that the motorman, in the exercise of ordinary care and prudence, saw, or should have seen, the danger in time to avoid the accident, the motorman is entitled to the presumption that he is not guilty; and when a request is made, it is the duty of the court to instruct the jury as to his right to assume that the other party will perform his relative duty. This is but saying that the driver could, and under ordinary conditions should if possible, get off the track when a car is approaching, because the car cannot. A motorman owes a duty to the driver, but the driver owes an equal duty to the motorman and to the passengers in the street car. The theory of respondent is fully covered by the court, but against the evidence of the respondent appellant had offered an equal or greater number of witnesses, who testified that the street car had come to a full stop, while the auto came full head-on into it. This, taken in connection with Mrs. Pantages' admission that she could have stopped at any place within one hundred feet of the street car, but instead of doing this, clung to the hope that she might guide

it off the track in time to miss the car, made the requested instruction vital to appellant's case. She took the main chance, and may have misled the motorman into a belief that no danger was imminent. It seems to us that this case falls within the general rules announced in the following cases: *Traver v. Spokane St. R. Co.*, 25 Wash. 225, 65 Pac. 284; *Hall v. Washington Water Power Co.*, 46 Wash. 207, 89 Pac. 553; *Duteau v. Seattle Elec. Co.*, 45 Wash. 418, 88 Pac. 755.

The law, as applied to a rapidly moving street car propelled by electricity or cable, is of modern growth, and the relative duties of the driver of the car and the public have not been defined without some difficulty, growing out of the application of the law long since applied in the case of steam railroads operating over their own right of way, and to which they have at least a superior, if not an absolute, right. As necessity is the mother of invention, so is it of the law; so that finally it has been determined by the great weight of authority that the right of the street car company and of the public to use the streets is a common one, subject to some modifications. "The law of the road" does not apply, for the street car cannot turn out, and the street car being in aid of the use for which the street is created, it is not negligence *per se* either to go upon or to cross a street car track in sight of a car, if it be a reasonable distance away. No doubt there are other modifications now and to be defined hereafter, but the requested instruction is at least within the conditions covered by these principles.

The other instructions requested, and upon which error is predicated, were either covered by the general instructions of the court or were properly refused as inapplicable to the case. For the errors noted the judgment is reversed, and the cause remanded for a new trial.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8093. Department One. November 2, 1909.]

SADIE SILVERSTONE *et al.*, *Appellants*, v. A. M. HANLEY *et al.*, *Respondents*.[1]

ADVERSE POSSESSION—HOSTILE CHARACTER—RECOGNITION OF SUPERIOR TITLE—PAYING TAXES. The taking out of delinquency tax certificates upon taxes assessed against an unknown owner is not the recognition of a superior title, and will not affect title by adverse possession under claim of right and title for the statutory period.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 23, 1909, upon findings in favor of the defendants, after a trial on the merits before the court without a jury. Affirmed.

Judd & Olson, for appellants.

Vince H. Faben and *S. H. Kelleran*, for respondents.

GOSE, J.—This is an action to quiet title to certain real estate. From a decree in favor of the respondents, the case was appealed to this court.

The only question presented is, whether the findings of fact and conclusions of law support the decree. In the absence of any statement of facts or bill of exceptions, the findings will be presumed to be responsive to the pleadings.

The court found that the respondent Hanley entered into the possession of the premises prior to the year 1893, under claim of right and title; that he fenced the land with a solid fence, planted an orchard thereon; that he continued in the open and notorious possession thereof, under such claim of right, until the year 1901, when he sold and conveyed the same to the respondent Harn and his wife; that Harn's wife died intestate before the commencement of the action, leaving surviving her a husband and five minor children, the co-respondents. The court further found:

"That the defendant Harn and the defendant Hanley and the minor heirs of Adela Harn have continuously for more

[1]Reported in 104 Pac. 767.

than ten years prior to the commencement of this action openly and notoriously held, maintained and occupied the said premises to the exclusion of all other persons, including the plaintiff and those by, through and under whom the said plaintiffs claim title."

The findings are substantially reiterated in the conclusions of law. The decree was that the respondents "are the owners of the legal and equitable title" to the land.

The appellants, the owners of the record title, assert that other findings, which we shall notice, destroyed the efficacy of the finding of title by adverse possession. The substance of the findings relied upon by the appellants is, that in the month of November, 1899, the respondent Hanley received a delinquency tax certificate upon the premises for the years 1893 to 1899, both years inclusive, the premises having been assessed to an unknown owner; that he continued to pay the taxes to and including the year 1901, and that his co-respondents thereafter paid the taxes. In effect, the appellants urge that the taking out of the delinquency tax certificate by the respondent Hanley was inconsistent with the claim of ownership, and that the findings as an entirety negative a title by adverse possession. Giving the findings first mentioned a liberal interpretation, as we think we must, when read in connection with the decree, they are sufficient to establish an adverse possession taken and held in good faith under a claim of right, for the statutory period. Where the findings are not consistent with each other, if there is one or more which support the decree it will be upheld. *Howey v. Bingham*, 14 Wash. 450, 44 Pac. 886. However, the appellants' contention, that the taking out of the tax certificate is a recognition of a superior title, is not tenable. The payment of taxes by the party in possession is not necessary in order that the possession may ripen into a title. *Johnson v. Conner*, 48 Wash. 431, 93 Pac. 914.

In the instant case, as we have seen, the land was assessed to an unknown owner. The property was taxable, and the

taking of the tax certificate was but a recognition of the taxing power of the state. The respondent could have paid the taxes without recognizing a superior title, and we do not regard the acceptance of the certificate as having any greater force. This view finds support in the following cases: In *Griffith v. Smith*, 27 Neb. 47, 42 N. W. 749, it was held that the rights of a party in adverse possession of land were not impaired by the purchase of a tax certificate and accepting and recording a tax deed, and that such act could not be treated as an abandonment of the possession or an acknowledgment of the superior title of the original and former owner. The same view was announced in *Hayes v. Martin*, 45 Cal. 559. In *Cannon v. Stockmon*, 36 Cal. 535, 95 Am. Dec. 205, the refusal of the court to instruct the jury that, "A party in possession of premises claiming to own the same may buy his peace by purchasing any outstanding title or claim of title without admitting such title or claim of title to be valid," was held to be error. In the case last cited the court, speaking of one in possession who purchased an adverse claim, said: "He has a right to quiet his possession and protect himself from litigation, in any lawful mode that appears to him most advantageous or desirable." The following cases support the view we have announced: *Mather v. Walsh*, 107 Mo. 121, 17 S. W. 755; *Omaha & F. Land & Trust Co. v. Hansen*, 32 Neb. 449, 49 N. W. 456; *Myer v. Hope*, 101 Wis. 123, 77 N. W. 720; *Singer Mfg. Co. v. Tillman* (Ariz.), 21 Pac. 818.

The decree will therefore be affirmed.

Rudkin, C. J., Fullerton, Chadwick, and Morris, JJ., concur.

[No. 8018. Department Two. November 2, 1909.]

GENERAL LITHOGRAPHING & PRINTING COMPANY, *Respondent*, v. WASHINGTON RUBBER COMPANY, INCORPORATED, *Appellant*.[1]

CONTRACTS—ACCEPTANCE—CONDITIONAL—CONSTRUCTION BY PARTIES. The parties are shown to have construed a contract as unconditionally accepted, by acting upon it, where it appears from letters that defendant offered to assume payment of a contract for printing a catalogue, "on condition that there will be no additional charges beyond the original contract price of $800," which was accepted by the plaintiff with the understanding that it was "to have the $800 as originally agreed, and no changes to be made in your copy except at your expense," that plaintiff stated it thought none would be necessary, but if any were made plaintiff would "expect $1.25 per hour for composition"; and where the defendant thereupon informed the plaintiff to go ahead with the work and furnish proofs, which was done.

CONTRACTS—CONSTRUCTION—GUARANTY. Where originally plaintiff had a contract with M. company to print a catalogue, which was to be an advertising medium for that company and also for the defendant company, and after delay, the defendant offered to "assume payment" of the contract price on delivery of the catalogue, which offer was accepted, the same amounts to more than a mere guarantee, but is an independent contract for the printing, where defendant's interest directly appears.

DAMAGES—BREACH OF CONTRACT—MEASURE. Upon breach of a contract for a catalogue, upon which work had been done, by refusal to allow the same to be completed, the measure of damages was the reasonable value of the work done, the depreciation in the value of paper purchased for it, and the profit plaintiff would have made.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 14, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Ira Bronson and *D. B. Trefethen*, for appellant.
Shank & Smith, for respondent.

[1]Reported in 104 Pac. 650.

PARKER, J.—The facts in this cause as found by the court, the trial being by the court without a jury, are, in substance, as follows: About June 24, 1907, the plaintiff and Mix Fire Apparatus Company entered into a contract, whereby the former agreed to perform the work and furnish material for the printing of 3,500 copies of a catalogue for the latter, at the agreed price of $800. In pursuance of the terms of the contract, the plaintiff proceeded with the work, when the Mix Fire Apparatus Company requested plaintiff not to complete same until further orders, and thereupon plaintiff held the printed forms for the work for a period of two months, for which it was entitled to $50 as a reasonable charge for the holding of the forms. On the 15th day of November, 1907, in consideration of the release and discharge by the plaintiff of said claim of $50 for holding the forms, and a continuation and completion of the contract as originally made, the defendant entered into a contract in writing whereby plaintiff was to complete the catalogue and the defendant was to accept and pay for the same.

In pursuance of this last contract the plaintiff proceeded to perform the same, and submitted proofs for correction to defendant preparatory to final printing, but defendant wholly failed and refused to correct and return said proof, and refused to allow the work to proceed or to fulfill the terms of the contract on its part. The reasonable value of the work and labor in and about the composition performed by plaintiff, is $200. The reasonable value of labor incident to the furnishing of proof to defendant is $25. The depreciation in the value of paper purchased by plaintiff for the work and left on hand is $100, and the profit plaintiff would have made upon the contract, had it been allowed to complete the same, is $200. From these facts the court concluded, as a matter of law, that plaintiff was entitled to recover from defendant $525, and rendered judgment accordingly, from which defendant has appealed.

Appellant having filed its exceptions to the court's find-

ings, contends that there was no contract shown by the evidence to have been entered into between the parties the breach of which would warrant a recovery. The contract referred to in the court's findings as being entered into between the appellant and respondent is evidenced by two letters as follows:

"Seattle, Wash., 11-6-07.

"General Lithographing & Printing Co., City.

"Gentlemen: Referring to the writer's conversation with your Mr. Graff about six weeks ago, at which time he proposed to him that The Washington Rubber Co. would be willing to assume the payment of $800.00 for the catalogue ordered from his Company by the Mix Fire Apparatus Co. on delivery of said catalogue in accordance with the contract as placed, we herewith confirm said offer on condition that there will be no additional charges beyond the original contract price of Eight Hundred Dollars ($800.00). Kindly advise us what decision you have come to on this offer and oblige, Yours respectfully,

"The Washington Rubber Co.,
"By Franz F. Richter, Pr."

"Nov. 15, 1907.

"Washington Rubber Co., 216 Jackson St., City.

"Gentlemen: In answer to your letter dated November 6th, 1907, we beg to accept your proposition with the understanding that we are to have $800.00 for the catalogue printed as originally agreed, and no changes to be made in your copy or corrections except at your expense.

"The job has been set and waiting for you at some time, ready to run. We believe there will be no changes necessary but in case there are, we will expect $1.25 per hour for composition changes. Yours truly,

"General Lithographing & Printing Co."

Counsel for appellant argue that the language of the second letter does not constitute an unconditional acceptance of the proposition contained in the first letter, because of the words therein: "And no changes to be made in your copy or corrections except at your expense." There may be room for argument as to whether or not these words so qualify the acceptance as to make it conditional and thereby prevent the

meeting of the minds of the parties. We are not inclined to so regard it, but rather as a statement indicating that there would be extra charge for any extra work beyond the strict terms of the contract. The latter part of the letter lends support to this view. However, this involves only a question of construction which we are relieved from solving if, as a matter of fact, the parties subsequently treated the contract as existing. Mr. Graff, the president of respondent company, referring to a time immediately following the exchange of the letters, testified: "We immediately took new proofs as requested; Mr. Richter told me to go ahead with the work and to furnish new proofs for Mr. Mix to correct, which we did." If this be true, and we think the trial court was warranted in so believing from the evidence, it at once becomes apparent that both parties regarded the contract as complete.

It is contended that, even if the contract was entered into between appellant and respondent, the catalogue was never furnished as agreed, and that the finding of the court to the effect that the defendant failed and refused to return the proof and refused to allow the work to proceed was not warranted by the evidence. While there was some conflict in the evidence, we think it sufficient to support the court's finding on that question.

It is further contended that the letter of November 6, 1907, was no more than a guarantee of payment for the catalogue when delivered, and therefore there could be no liability until it was actually completed and delivered. We think this contract was something more than a mere guarantee. The evidence shows appellant had a direct interest in the completion of the catalogue, in that it was to be an advertising medium for the appellant and its goods as well as for the Mix Fire Apparatus Company. This was the apparent purpose of all parties from the time of making the first contract, though appellant was not a formal party to that contract. What understanding it had with the Mix Fire Apparatus

Company before the new contract, if any, as to assisting in paying for the publication, does not appear, nor is it material. The fact of its direct interest is no less apparent, hence the making of the contract created an original obligation on the part of appellant. See 20 Cyc. 1397-8 and authorities cited. It was, in effect, a new contract for the printing of the catalogue, and appellant having failed to perform on its part, became liable in damages to respondent, which we think the trial court has correctly measured. Other contentions of learned counsel for appellant we do not think require discussion. The judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and CROW, JJ., concur.

[No. 8312. *En Banc.* November 2, 1909.]

In the Matter of the Application of MARY A. CLERF *for a Writ of Mandamus.*[1]

MANDAMUS—REMEDY BY APPEAL—TO CONTROL ACTIONS OF COURT—DISCRETION. Mandamus will not lie to compel a court to render a decision in a cause where, after trial and submission, the court found that other parties were necessary to a complete determination of the case, and ordered them brought in; since the court is exercising its discretion and not refusing to proceed with the cause; and the remedy for error, if any, is by appeal from the final judgment.

SAME—REFUSING TO PROCEED WITH CAUSE—ESTOPPEL. A plaintiff who misleads the court as to her course, after being ordered to bring in new parties, delaying many months without action, is not in a position to complain of the dilatoriness of the trial judge, where he proceeded with reasonable diligence as soon as plaintiff's refusal to bring in new parties was made known.

DISMISSAL AND NONSUIT—NECESSARY PARTIES—REFUSING TO BRING IN—RIGHTS OF INTERVENERS. An action to determine the right to the waters of a stream cannot be dismissed on plaintiff's refusal to bring in new parties, after other parties had by leave of court intervened and asked affirmative relief.

PARTIES—NEW PARTIES. The right of the court to order necessary parties to be brought in is inherent, and is conferred by Bal. Code, § 4840.

[1]Reported in 104 Pac. 622.

Application filed in the supreme court September 24, 1909, for a writ of mandamus to compel the superior court for Kittitas county, Kauffman, J., to adjudicate a cause upon the issues and evidence presented. Writ denied.

A. Mires and *Graves & McDaniels*, for petitioner.

Pruyn, Streff & Hoeffer, for respondent.

FULLERTON, J.—This is an application for a writ of mandate. The relator avers that on or about May 13, 1905, her predecessor in interest, as plaintiff, began an action against certain named defendants, the object and purpose of which was to obtain a judgment and decree adjudging the plaintiff to have a prior and paramount right, as against the defendants, to use the waters of a certain stream known both as Caribou creek and Cherry creek, to the extent of 370 inches of water, miners' measure, under a four-inch pressure, for stock and domestic purposes and for the purpose of irrigating certain land then owned by plaintiff; claiming such right for the purposes stated by reason of a first and prior appropriation of such waters and their application to the uses mentioned, made by himself and by his predecessors in interest to whose rights he succeeded.

She further averred that thereafter certain parties were dismissed from the action, and certain others intervened and became parties thereto by leave of court; that the plaintiff died, and that she succeeded to all his rights and interests, and was substituted as plaintiff by permission and order of the court; that the defendant and interveners filed pleadings in which they controverted the plaintiff's claim, and set up and claimed interests in the waters of the creek adverse to the claim of the plaintiff, which they alleged to be prior and paramount thereto. That thereafter the cause was assigned for trial, and between March 2, 1908, and March 6, 1908, was tried to the court, each party submitting evidence in support of their several allegations, finally submitting the cause to the court for adjudication. That in April, 1908, the court

announced, in substance, that it was unable to find that the plaintiff was entitled to any prior rights to the waters of the stream by virtue of prior appropriation, but that the waters must be apportioned among all of the owners of land riparian to such stream according to acreage, and that no apportionment or final judgment could be entered without making parties to the action the owners of all the lands riparian to such creek; and thereupon entered an order directing the relator as plaintiff to cause all such riparian owners to be brought in and made parties to such action within sixty days from April 8, 1908.

The relator then avers that Caribou or Cherry creek is a stream arising in the hills and mountains lying to the north and east of Kittitas valley, in the county of Kittitas, and flows southerly through such valley a distance of some twenty miles where it empties into the Yakima river; and that the condition of the titles to the various lands along the creek are unknown to the relator, and it is impossible for her to ascertain who are the actual owners of such lands; and that the withholding of the final adjudication of the cause until relator shall bring in such owners and make them parties to the action is unwarranted and without authority of law. It is then averred that more than ninety days have elapsed since the cause was submitted to the court for adjudication, but that the court refuses and declines to render judgment therein; whereupon she prayed that a writ of mandate issue compelling the court to adjudicate the case upon the issues and evidence presented.

The trial court, in response to the notice served upon it, appeared and controverted the relator's application. In its answer it admitted substantially all of the allegations of relator. Answering further, however, it averred that no formal demand or demand of any kind had been made upon the court for a decision of the cause on the record as originally submitted, nor had any formal refusal to comply with the court's order been made, but that on the contrary, the relator pur-

sued a course of conduct that had tended to mislead the court as to her intentions; that she had, among other things, appeared in court many months after the order to bring in further parties had been entered, and sought a renewal of an interlocutory order regulating the distribution of the water pending the trial of the action; and had at the same time questioned the sufficiency of the pleadings of certain riparian proprietors on the stream mentioned who had intervened in the action by leave of court since the court announced that further parties were necessary to a final adjudication of the case.

Further answering, the court averred that the relator in questioning the pleadings of such interveners raised no question as to their right to intervene, and particularly did not question their right on the ground that the case had been submitted to the court for adjudication and was then awaiting adjudication by the court; further averring that there were but two riparian owners who yet remained to be brought into action, and that certain of the defendants and interveners asking affirmative relief had applied for leave to make such riparian owners parties to the action, and that the court would proceed to make such an order, and to a further trial and determination of the cause upon its merits with all reasonable dispatch.

The relator does not controvert the court's return, but insists, nevertheless, that she is entitled to a decision on the record as it stood when the original submission of the cause was made. But whether this contention be true or not this court cannot try out the question in a mandamus proceeding. A mandamus will run to an inferior court to compel it to act when it holds a cause in abeyance and refuses to decide either one way or the other, but it does not lie to control judicial discretion. This latter, we think, the relator is asking us to do by this application. The trial court is not refusing to proceed to a final determination of the action before it, but is proceeding in a way that the relator conceives is a violation

of her rights. Her remedy for this error, if it be error, is not by mandamus. She must pursue the cause along the lines marked out by the trial court unto the end, and then seek a review of the judgment entered. She can, of course, on that review, if she has preserved her rights by proper objections, have reviewed any ruling made during the progress of the cause, even the refusal of the court to decide the controversy on the records originally submitted, but she cannot have a review of the question by the shorter route in the nature of a mandamus proceeding.

If the trial court has not proceeded in the cause with as much diligence as the exigencies of the case required, we think a part of the blame therefor can rest with the relator. Had she made known to the court her intent to refuse to bring in the required parties, and her desire to have the case heard on the record as first heard within a reasonable time after the promulgation of the order, doubtless the court would have at once given other parties to the cause that opportunity, and proceeded to a further hearing with its usual diligence. But the relator's action was not prompt, and the court seems to have acted with reasonable diligence after the relator made known the fact that she would not proceed on the lines marked out by the court.

The relator, seemingly, contends that the court should have dismissed the action, or dismissed it as to her, at least, on her refusal to comply with the court's order. But there were other parties to the action claiming affirmative relief, and the court could not properly dismiss it as to them without giving them an opportunity to bring in the parties the court deemed necessary to a final adjudication. Nor could it dismiss the relator from the action. Her continuance therein was necessary to a final adjudication of the cause as the court viewed the record. True, the court cannot compel her to participate in any further trial of the cause, but it can try it on the issues made by the pleadings of the other parties, and treat

her as a party making default, thus binding her by the final judgment entry.

The right of the court on its own motion to require additional parties to be brought in is also questioned. But this power is inherent in the court, and, moreover, is expressly conferred on it by statute, Bal. Code, § 4840 (P. C. § 269).

The application is denied.

RUDKIN, C. J., CHADWICK, GOSE, MORRIS, DUNBAR, CROW, and PARKER, JJ., concur.

MOUNT, J., took no part.

[No. 8080. Department One. November 2, 1909.]

EMMA G. HELLAND, *Respondent*, v. SYLVESTER J. BRIDENSTINE, *Appellant*.[1]

MALPRACTICE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence to make a case for the jury, in an action for malpractice, in the use of infected and unsterilized instruments from which a disease might have been contracted, where the defendant denied plaintiff's statement that he took the instruments from a drawer without cleansing them or that he ever did so or kept them there, and two other witnesses testified that on similar examinations made by him he took the same instruments from the same place and used them in the same way that plaintiff described.

SAME. There is sufficient evidence to sustain a verdict for malpractice in the use of infected and unsterilized instruments from which a disease might have been contracted, where there was evidence tending to show the negligent use of instruments, without cleansing, that prior thereto plaintiff was free from the disease and could have contracted it in no other way, and became affected within the usual time thereafter for the disease to germinate; as it was only necessary to show a chain of circumstances from which the ultimate fact might reasonably be inferred.

TRIAL—PROVINCE OF COURT AND JURY—EXPERT EVIDENCE. A statement by expert witnesses that a disease cannot develop under certain conditions does not require withdrawal of the issue from the jury, where there was a question for the jury as to the existence of the facts recited on which the conclusion was based.

[1]Reported in 104 Pac. 626.

EVIDENCE—OPINIONS—MEDICAL EXPERTS. A hypothetical question to a medical expert may embody the very fact ultimately to be found, where the inference from the facts proven involved a question of medical science on which the expert's opinion was proper.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS—MEASURE OF DAMAGES. In an action for malpractice it is not reversible error to refuse to give an instruction that the jury could not take into consideration the loss of service or earnings of the plaintiff, which had been alleged in the complaint, where there was no evidence on that subject in the case, and it does not affirmatively appear that the jury went out of its way to find an issue on that subject.

DAMAGES—INJURIES FROM MALPRACTICE—MEASURE—INSTRUCTIONS. In an action for malpractice in negligently communicating a loathsome disease, an instruction on the measure of damages properly submits to the consideration of the jury the plaintiff's physical and mental pain, loss of time, humiliation and disgrace, and expense of effecting a cure, including physician's charges and medicines.

DAMAGES—INJURIES—MALPRACTICE—EXCESSIVE VERDICT. A verdict for $4,000 for malpractice in negligently communicating a private disease by the use of infected instruments, is excessive, and should be reduced to $2,000, where the plaintiff was fully cured without permanent disability, and her losses were less than $200, the balance being for pain and suffering, which must be limited to compensatory damages.

MORRIS, J., dissents.

Appeal from a judgment of the superior court for King county, Rice, J., entered November 6, 1908, upon the verdict of a jury rendered in favor of the plaintiff, for $4,000, for personal injuries received through the malpractice of a physician. Reversed and a new trial ordered unless $2,000 is remitted.

Peters & Powell, for appellant.

Walter D. Peters, *James W. Carr*, *John E. Humphries*, and *George B. Cole*, for respondent.

FULLERTON, J.—The respondent, a widow, brought this action against the appellant, who was a physician and surgeon in active practice in the state of Washington, to recover for injuries received by her arising from alleged mal-

practice on the part of the appellant. The alleged malpractice consisted of the use in and on her genital organs of unclean and unsterilized instruments, whereby there was communicated to her a loathsome disease technically known as gonorrhea, from which she suffered great bodily pain and mental anguish to her damage in a large sum of money.

The appellant answered the complaint admitting his attendance upon her in the manner claimed, but denied that the instruments he used upon her person were unclean or unsterilized, or that the disease known as gonorrhea, or any disease, had been communicated to her thereby, and denied that she had such a disease as gonorrhea or that she had been damaged in any sum whatsoever through any act of his. The cause was tried on the issues thus made before the court sitting with a jury, and resulted in a verdict and judgment in favor of the respondent in the sum of $4,000, from which this appeal is taken.

The assignments of error suggest five principal questions, (1) that the evidence was insufficient to sustain the verdict and judgment; (2) that the court erred in refusing to give an instruction requested by the appellant; (3) that the court erred in permitting a witness to answer a certain hypothetical question; (4) that the court erred in instructing the jury as to the amount of the recovery; and (5) that the verdict is excessive. These questions we will notice in their order.

The evidence on the part of the respondent tended to show that the respondent had been suffering for a number of years with some nervous affliction; that early in the year 1906, her troubles became more acute, when she called in the appellant to prescribe for her; that he examined her as to her symptoms and prescribed some form of medicine which she took as directed, but which gave her only temporary relief; that the appellant thereupon stated to her that her symptoms indicated some derangement of the genital organs, and that if she would call at his office he would examine her for the purpose of ascertaining whether any such derangement was the

source of her ill health; that she called as requested, on or about February 1, 1906, when the doctor proceeded to examine her genital organs, using for that purpose certain instruments, called a speculum and probe, which he took from a drawer nearby; that the instruments when taken from the drawer were wrapped in a towel, and were used upon her as they were when taken from the towel, without being washed or cleansed in any manner; that between five and ten days thereafter she began to be troubled with inflammation and pain in the parts affected, accompanied by a discharge, which gradually became more severe, causing her to take to her bed; that she again called in the appellant as her physician, stated to him her trouble, and received from him certain remedies which she applied as directed; that he continued to treat her for about a month thereafter, when she notified him that she did not require his services further; that shortly after this he called at her residence and offered her free treatment which she accepted, and for some time thereafter he treated her medically, giving both internal remedies and remedies to apply locally in the form of suppositories; that during this latter treatment he made another examination with the speculum, and stated to her that she would probably have to be operated on surgically before she could be cured; that the respondent refused to submit to such an operation, whereupon he ceased to treat her further.

The respondent further testifies that she was in bed most of the time suffering from pains in the genital region of her body, accompanied by a discharge of a purulent nature, between the time the appellant quit treating her and August 15, 1906, when she consulted another physician of Ballard, who pronounced her disease to be gonorrhea; that this physician treated her for some three months thereafter, finally pronouncing her substantially cured. She also testified that her husband died on January 11, 1906, and that she had not had sexual intercourse with him for some weeks preceding his death. She was not asked, and did not testify directly, that

she had not had sexual intercourse with any other man, but did state that her husband had no venereal disease, and that there was no other way than from the appellant's instruments by which she could have obtained the disease. The physician treating her last also testified that when she called upon him in August, 1906, for treatment she was suffering from chronic gonorrhea, which he ascertained not only from her diagnostic symptoms, but by finding in the discharge from her genital organs the specific microbe of the disease. He testified also as an expert that the respondent could acquire the disease from an infected speculum used upon her in the manner she testified this one was used.

The appellant testified that he was called upon to treat the respondent in January, 1906, when he found her complaining of much pain in the side in the region of the liver and pleura and of considerable pain in the abdomen and right ovary; that later she complained of soreness in the ovaries and womb and some discharge; that he requested her to come to his office for an examination; that she did come and he examined her genital organs, finding an enlarged condition of the womb, some inflammation of the mucous membrane, accompanied by a discharge; that in making the examination he used a speculum, a probe and forceps; that these instruments were kept on top of a medicine case in his office; that they were never kept in a drawer; that after using them he always washed them in a mercuric iodine solution and soap and hot water, and immediately before using them he sterilized them by boiling them in hot water in a receptacle on a gas stove in the back part of his office, and that it was in this manner that these instruments had been cleansed and sterilized before use on the respondent; that the last time he had used the instruments prior to January 25, the date he used them on the respondent, was on January 19, on a woman suffering from chronic uterine trouble, not gonorrhea, and not infectious, and that he had not treated a case of gon-

orrhea in a female for many months prior to the time he treated the respondent.

He further testified that his office was heated by a steam heater operated only in the daytime; that at night the office would become cold, running down to a temperature of from 50° to 55° Fahrenheit. The appellant also called a number of expert witnesses who testified, in substance, that gonococci, the microbes of gonorrhea, could not survive in a temperature as low as 50° or 55° Fahrenheit for any length of time, certainly not as long as four days, especially upon a nickel plated instrument such as a speculum; and each of them testified that, under the circumstances testified to by the appellant, it was impossible that the respondent could have obtained gonorrhea from his treatment. In rebuttal two witnesses testified that the appellant had made an examination upon them similar to the one made on the respondent, the one in April, 1906, and the other in June, 1906, and that in neither case did he sterilize the instruments before using them; that he took them from a drawer where they were kept wrapped in a towel, and used them without cleansing or sterilizing in any manner.

There was here, we think, sufficient evidence on the questions of the appellant's negligence, whether the respondent had actually become infected with gonorrhea, and whether the disease was communicated to her by means of the instruments the appellant had used upon her person, to require their submission to the jury. The respondent was not required to prove her case beyond a reasonable doubt, nor by direct and positive evidence. It was only necessary that she show a chain of circumstances from which the ultimate fact required to be established is reasonably and naturally inferable. If it be true (and whether or not it is true was for the jury) that the respondent went to the appellant's office free from gonorrhea; that the appellant introduced into her vagina a speculum, which he used on other patients, without cleansing or sterilizing it, and that with-

in the time thereafter usual for such a disease to generate, she became afflicted with the disease, and there was no other known source of infection, it is a reasonable inference that she caught the disease from the instrument used upon her by the appellant, and that the disease was negligently communicated to her. Nor is the inference so far overcome by the evidence of the expert witnesses as to require the court to take the question from the jury. None of them purported to testify how long the microbe gonococcus would live on a speculum which was wrapped in a towel and placed in a drawer in the temperature of the appellant's office, and the court is not at liberty to assume that their evidence related to such a condition. Moreover, the opinions of experts are taken to aid the jury in arriving at the ultimate fact, and no matter how positive may be their conclusions drawn from a given state of facts, it is still a question for the jury whether or not the facts recited on which the conclusion is based are the facts proven by the evidence, and whether or not the conclusion is correctly drawn. For these reasons we think the facts sufficient to sustain the verdict of the jury.

The hypothetical question complained of was a fair summary of the facts which the respondent's evidence tended to prove. True the question embodied the very fact that was ultimately to be found by the jury, but this does not render it incompetent. To reach their final conclusion the jury were compelled to draw an inference from the facts proven which involved a question of medical science; that is to say, after all of the facts had been given in evidence, it was still a question whether the disease could be communicated in the manner recited, and as that question involved a matter of medical science, it was proper to submit to the jury on the question the opinion of an expert versed in that science.

The requested instruction was the following:

"You are instructed that should you find for the plaintiff in any sum you should not take into consideration or allow her any sum for loss of service or earnings as there is no evidence in the case to support such a claim."

There was in fact no evidence introduced in the case tending to show loss of service or earnings on the part of the appellant, and, inasmuch as loss of earnings was one of the elements of damage alleged in the complaint, the court might very properly have given the instruction requested. But it was not reversible error in this case to fail to do so. There was no misdirection on this point; what fault there was lies in the fact that the jury were not specially cautioned as to the matter. But it will not be presumed that the jury went out of its way to find on an issue on which the evidence was silent. It does not affirmatively appear that they did so, and to constitute error it must so affirmatively appear. Error must be shown affirmatively; it is not presumed.

On the question of the amount of the recovery the court instructed as follows:

"If you find for the plaintiff, you will allow her such sum as will compensate her for the injury sustained. In fixing the damages, if you find any, you will take into consideration the physical and mental pain and suffering by the plaintiff if any, by reason of the injury and loss of time if any, the sense of humiliation and disgrace if any, the expense of effecting a cure, including physician's charges and medicines if any; and from those considerations allow her such sum as will compensate her for the injuries sustained by her, if any."

This instruction is within the rule of the case of *Niemeyer v. Washington Water Power Co.*, 45 Wash. 170, 88 Pac. 103, and the cases there cited, and on the authority of those cases we hold it free from error.

It is finally contended that the verdict of the jury is excessive. This contention we think must be sustained. The appellant fully recovered from the disease, and no permanent disability or injury resulted therefrom. Her losses because of inability to perform her ordinary duties while afflicted were but little more than nominal, and her expenditures for medicines and medical fees were inconsiderable—the whole of her losses in these respects did not exceed at the utmost the sum of two hundred dollars. The remainder of the verdict, there-

for, was awarded as damages for bodily pain and suffering and for mental anguish. For her pain and suffering, both physical and mental, she is of course entitled to full compensation, but this is the extent of her rights. Nothing should be awarded her as smart money, or for the purpose of punishing the defendant; the right to punish being the prerogative of the state. Comparing the award of the jury with the evidence of the respondent concerning her damages, we fear the jury lost sight of the fact that compensation for the injuries suffered was the purpose of the action, and that they have allowed a recovery for matters not properly within their province. We shall not, however, direct a new trial in the first instance, but will remand the case with instructions to allow the respondent to take her choice between a judgment for two thousand dollars and a new trial of the action. The order will be, therefore, that if the respondent, within thirty days after the remittitur reaches the trial court, consents in writing to take a judgment for two thousand dollars, the trial court is directed to enter judgment in her favor for that sum; if she does not so consent, then a new trial will be awarded. The appellant will recover costs in this court.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

MORRIS, J., dissents.

[No. 7659. *En Banc.* November 4, 1909.]

J. B. CORDINER, *Appellant*, v. A. J. DEAR *et al.*, *Respondents*.[1]

STATUTES—CONSTRUCTION—"PASSAGE OF ACT." The proviso to Laws 1907, p. 398 (for the limitation of actions to set aside a tax deed), that the act shall not apply to certain actions if commenced within one year "after the passage of the act," has reference to the time when the act received the final sanction necessary to constitute it a law, and not to the time when the law went into effect, ninety days after the adjournment of the legislature; since there is no reason to give any technical or other than the ordinary meaning to the words (RUDKIN, C. J., DUNBAR, MOUNT, and MORRIS, JJ., dissenting).

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered July 14, 1908, upon sustaining a demurrer to the complaint, dismissing an action to recover real property and to vacate a tax deed. Affirmed.

Cordiner & Cordiner and *J. C. Kleber*, for appellant.

Reeves & Reeves, for respondents.

FULLERTON, J.—This action was brought to recover possession of certain lands situated in Chelan county which had theretofore been sold for delinquent taxes, and to set aside and cancel the deed of the county treasurer issued to the purchaser at such sale. The land was sold at a tax foreclosure sale held in May, 1901, and the deed was issued on May 22, 1901. The present action was commenced on April 6, 1908, or nearly seven years after the issuance of the deed. In his complaint the appellant attacked the foreclosure and sale on the ground that it was void for want of jurisdiction over the person of the then owner of the property, alleging that the attempted service of summons upon him, which was made by publication, was so far irregular as to render it void. To the complaint a demurrer was interposed, which the court sus-

[1]Reported in 104 Pac. 780.

tained. The appellant thereupon elected to stand on his complaint, when judgment of dismissal and for costs was entered against him.

The principal contention of the parties on this appeal, and the only one we have found it necessary to notice, is over the statute of limitations. The right of action was adjudged to be barred by the act of March 15, 1907. That act consists of one section and reads as follows:

"Section 1. Actions to set aside or cancel the deed of any county treasurer issued after and upon the sale of lands for general, state, county, or municipal taxes, or for the recovery of lands sold for delinquent taxes, must be brought within three years from and after the date of the issuance of such treasurer's deed: Provided, This act shall not apply to actions not otherwise barred on deeds heretofore issued if the same be commenced within one year after the passage of this act." Laws 1907, p. 398.

By returning to the dates above given it will be observed that the action was begun more than one year after the passage of the act, if by the term passage be meant the time when the act was actually passed by the legislature, but less than one year if by that term be meant the time when the act went into effect, which, as it had no emergency clause, was ninety days after the adjournment of the legislature, or June 12, 1907. The determination of the meaning of the term, therefore, is the principal inquiry here.

The primary rule of construction of statutes, it will be remembered, is to ascertain and give effect to the intent of the lawmaker. The intent will govern when ascertained, even though it be inconsistent with the strict letter of the statute. But in ascertaining the intent, words are first given their plain, natural and ordinary meaning, and if when this is done the act as a whole has purpose and effect, and squares with the object the legislature evidently intended to accomplish, interpretation has accomplished its purpose, and the meaning and intent of the act has been discovered. It is only when to give to the words of the act their plain, natural, and

ordinary meaning, the act fails of its purpose, or becomes nugatory, that technical and secondary meanings of the words used may be resorted to.

In the case at bar there is nothing in the act itself that requires a resort to technical or secondary meanings of the words used to give the act meaning and effect. The legislature was fixing a time beyond which an action to recover land sold for delinquent taxes could not be prosecuted. As to cases arising in the future, or cases which then had a considerable time to run, a plain provision to the effect that the action must be brought within three years from the time the action accrued was amply sufficient. But there was another class of rights of action that could not be thus provided for, rights of action which had accrued three years and more prior to the time the legislature acted. These could not be cut off absolutely; it was necessary, in order that the limitation have effect as to them, that their possessors be given a reasonable time within which to begin such an action. Purpose and effect, therefore, are given to this act in its entirety, no matter which of the interpretations before suggested is given to the phrase "passage of this act." If the one be adopted, the possessors of rights of action then three years old and more had some nine months after the act went into effect within which to bring actions thereon, while if the other interpretation be given it they had one year, and either length of time is a reasonable time within the rule forbidding the cutting off of accrued rights of action without giving the possessors of such rights a reasonable time within which to commence actions thereon. So, we repeat, it is not necessary to depart from the plain, usual and ordinary meaning of the words used in the act in order to give it the effect intended by the legislature.

Now there is a difference in meaning between the phrases, "passage of this act," and "when this act takes effect," when applied to acts of the legislature. The former refers to the

time the act receives the final sanction necessary to constitute it a law, and the other is the time when it begins to speak as a law. This distinction is made in the constitution itself. For example, article 2, § 31, provides that, "No law, except appropriation bills, shall take effect until ninety days after the adjournment of the session at which it was enacted," etc., and the same idea is conveyed by the language of article 3, § 12; thus showing that the framers of the constitution meant one thing when they spoke of the passage or enactment of a law, and another when they spoke of a law going into effect. To give the phrase under consideration, therefore, its natural and obvious meaning would be to hold that it meant one year from the time the act received the final sanction necessary to constitute it a law, namely, the approval of the governor. It follows therefrom that the action was barred by the statute of limitations, and it is so ruled.

The judgment is affirmed.

CROW, PARKER, CHADWICK, and GOSE, JJ., concur.

RUDKIN, C. J. (dissenting)—I dissent. The act of 1907 fixes a two-fold limitation. First, a general limitation for all actions to cancel or set aside tax deeds; and second, a special limitation for deeds issued prior to its passage. It seems to me that the legislature clearly intended that the two limitations should become operative at the same time, and that the period of limitation itself should be computed from that time. No word or part of the act took effect until ninety days after the adjournment of the legislature, and the one and three years should be computed from that date. Every legislative act should be read as of the day it becomes effective as a law, and all its provisions should be construed with reference to that date, unless a contrary intent clearly appears. I discover no such contrary intent in this case. The saving clause before us for construction refers to both the past and the future with reference to a given point of time.

It speaks of deeds "heretofore issued" and of "one year after the passage of this act." The word "heretofore" refers to the date of the passage of the act as explicitly as do the words "one year after the passage of this act," yet it will scarcely be contended that the words "heretofore issued" do not include all deeds issued prior to the time the act took effect, for as said by this court in *State ex rel. Atkinson v. Northern Pac. R. Co.*, 53 Wash. 673, 102 Pac. 876:

"The general rule is that a statute speaks from the time it goes into effect, whether that time be the day of its enactment or some future day to which the power enacting the statute has postponed the time of its taking effect. 'A law must be understood as beginning to speak at the moment it takes effect, and not before. If passed to take effect at a future day, it must be construed as if passed on that day, and ordered to take immediate effect.' *Rice v. Ruddiman*, 10 Mich. 125. 'A statute passed to take effect at a future day must be understood as speaking from the time it goes into operation and not from the time of passage. Thus, the words 'heretofore,' 'hereafter,' and the like have reference to the time the statute becomes effective as a law, and not to the time of passage. Before that time no rights may be acquired under it, and no one is bound to regulate his conduct according to its terms; it is equivalent to a legislative declaration that the statute shall have no effect until the designated day.' 26 Am. & Eng. Ency. Law (2d ed.), p. 565. See, also, *Price v. Hopkin*, 13 Mich. 318; *Grant v. Alpena*, 107 Mich. 335, 65 N. W. 230; *Galveston etc. R. Co. v. State*, 81 Tex. 572, 17 S. W. 67; *Jackman v. Garland*, 64 Me. 133; *Evansville etc. R. Co. v. Barbee*, 59 Ind. 592."

If the word "heretofore" refers to the 12th day of June, 1907, or the time when the act took effect, why do not the other words of like import refer to the same date. An act is technically passed when signed by the presiding officers of both houses, yet few courts have held that the common phrase "after the passage of this act" should be construed with reference to that date. The courts, with great unanimity, hold that the words quoted do not refer to any earlier date than the approval of the act by the executive. This is not because

the approval of the act is any part of its passage, technically speaking, but because the act is ineffectual for any purpose until approved, and as the lapse of ninety days from the adjournment of the legislature is as indispensable to the efficacy of a law as the executive approval, why should not the words refer to the expiration of that period, as well as to the formal approval by the executive. I think the rule for which I contend is sustained by the weight of authority where similar constitutional provisions exist. *Ex parte Lucas*, 160 Mo. 218, 61 S. W. 218; *Harding v. People*, 10 Colo. 387, 15 Pac. 727; *State ex rel. Churchill v. Bemis*, 45 Neb. 724, 64 N. W. 348; *Rogers v. Vass*, 6 Iowa 405; *Schneider v. Hussey*, 2 Idaho 8, 1 Pac. 343; *Rice v. Ruddiman*, 10 Mich. 125.

In the *Lucas* case, the act under consideration required all barbers to procure a license from a board of examiners "within ninety days after the approval of this act." In the *Harding* case, the act provided that "The state board of medical examiners, within ninety days after the approval of this act, shall receive through its president applications for certificates and examination." In the *Bemis* case, the act provided for the appointment of a board of fire and police "within thirty days from and after its passage." In the *Rice* case, an act of the Michigan legislature, approved February 4, 1859, provided for the holding of an election in *April next*. In the *Schneider* case, the limitation act provided that "When the cause of action has already accrued, the party entitled and those claiming under him shall have, *after the passage of this act*, the whole period herein prescribed in which to commence an action." In each of these states laws do not take effect until ninety days after the adjournment of the legislature, in the absence of a declared emergency. It may be said that each of these laws required some act to be performed under it before the law itself took effect, and that such a construction was necessary to uphold the law, and this is in a measure true except in the Idaho case. But a reference to the cases

will show that the courts did not base their decision upon that ground, but upon the broad ground that the words, *after the passage of this act*, "must be understood under the constitution to mean ninety days after the act can and does constitutionally take effect in the absence of a declared emergency."

In *Rice v. Ruddiman*, Judge Christiancy said,

"It is very clear the act did not take effect till ninety days after the end of the session. But we do not think the act was therefore void as to the election provided for. *It took effect in May, 1859, and must be understood as beginning to speak at the moment when it became a law, and not before. It must have the same construction as if passed on the day when it took effect, and directed by a two-thirds vote to take immediate effect.* 'April next' must therefore be understood as April, 1860, being the next April after the act took effect."

In the *Schneider* case, the court said:

"The words 'passage of the act,' while they have a technical meaning which is well understood, in this connection and as used in the section referred to, must be held to mean the time when the act takes effect. Any other construction of the words would give life and action to this section before it can have any such life."

An estoppel is urged against the appellant in the briefs and oral argument, but there is nothing in the record upon which such a doctrine can rest. The tax sale was made about three years before the commencement of this action. During that period the property increased in value and improvements were made by the purchaser, but this alone will not support a plea of estoppel. Our statute has fixed the period of limitation for actions of this kind, and a court indulges in judicial legislation when it attempts to bar a right of action within the statutory period for mere inaction or delay on the part of a plaintiff.

It is said that the appellant holds title under a quitclaim deed, obtained from a former owner for a nominal consideration, and is a speculator in tax titles, but this argument, I

apprehend, is addressed to the man and not to the judge. Counsel, in his zeal, seems to forget that the act was not passed for his case alone; that it is a sword for attack as well as a shield for defense; that the decision of today may tomorrow measure the rights of others who have been deprived of their all through the machinations of the very class against which he so bitterly inveighs. Should such cases arise, perhaps the majority would gladly retrace their steps. The right to move against a tax deed is an incident to the ownership of property, and one claiming under a void tax deed cannot defend on the ground that the holder of the legal title paid less than the property was worth. The one holds under conveyance from the general government, the other claims under the state, and each must stand or fall by his own title.

Certainty in the law is to be desired above all else. Cases will doubtless arise in this jurisdiction, as they have in others, in which this court will be compelled to hold that "after the passage of an act" means after it has taken effect under the constitution. This construction, in my opinion, should always be adopted, unless the language of the act shows plainly and unequivocally that a different date was intended. If I am right in my conclusion, the judgment should be reversed. If there is a doubt as to the correctness of my views, the same result should follow, for the act cuts off an existing remedy, and must be strictly construed against those asserting the bar.

"It is also the well-settled rule of courts that when there is doubt as to the time when the limitation commences to run, that construction should be given which is most favorable to the enforcement of the common-law rights of the citizen." *Schneider v. Hussey, supra.*

DUNBAR and MOUNT, JJ., concur with RUDKIN, C. J.

MORRIS, J. (dissenting)—I concur in the result, holding that the demurrer was properly sustained upon other grounds than that suggested in the majority opinion. Upon the ques-

tion of the proper construction of the statute relative to the time when the proviso became effective, I join in the minority opinion.

[No. 7352. *En Banc.* November 4, 1909.]

AUGUST ILSE, *Plaintiff and Appellant*, v. AETNA INDEMNITY COMPANY, *Defendant and Appellant*.[1]

CONTRACTS — ACTIONS — CONDITIONS PRECEDENT—ARCHITECT'S CERTIFICATE—IMPEACHMENT FOR FRAUD. The stipulation in a building contract that the certificate of the architect as to the amount due shall be deemed conclusive may be impeached for fraud when an excessive amount is allowed without the exercise of the architect's judgment.

DISMISSAL AND NONSUIT—WITHOUT PREJUDICE—FAILURE OF CONDITION PRECEDENT—CONTRACTS—ARCHITECT'S CERTIFICATE. The successful impeachment for fraud of an architect's certificate as to the amount due, which was to be conclusive and a prerequisite to action on the contract, does not entitle the defendant to a final dismissal on the merits, but only to a dismissal without prejudice to another action.

APPEAL AND ERROR—DECISION—REMAND—ISSUES—ACTIONS—CONDITIONS PRECEDENT. Where the plaintiff in an action on a building contract, in which the architect's certificate as to the amount due was a prerequisite to the action, joined issue on an affirmative defense impeaching the certificate for fraud, and failed to seek any recovery on *quantum meruit*, and the court found that the architect allowed an excessive amount without the exercise of his personal judgment, the plaintiff must submit to a dismissal without prejudice, and is not entitled to a reversal with a remand for a new trial on *quantum meruit*.

Cross-appeals from a judgment of the superior court for Spokane county, Kennan, J., entered February 6, 1908, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

[1]Reported in 104 Pac. 787.

Kenyon & Setters and *Graves, Kizer & Graves*, for plaintiff.

Cullen & Dudley and Peters & Powell, for defendant.

PER CURIAM.—This case presents an appeal and cross-appeal. We will refer to the parties as plaintiff and defendant. On July 20, 1905, plaintiff entered into a contract with Shoshone county, Idaho, to construct a court house and jail under the supervision of Stritesky & Sweatt, a partnership, as architects. Thereafter plaintiff, by written contract, sublet to the International Fireproof Construction Company a portion of the work to be done. The consideration of the subcontract was $20,400, and the construction company was required to, and did, give a bond for $15,000, with this defendant as surety thereon. The contract contained the following clause:

"The expense incurred by the (plaintiff) as herein provided either for furnishing materials or finishing the work, and any damage incurred through such default, shall be audited and certified by the architects whose certificate thereof shall be conclusive upon the parties."

The construction company did a portion of the work and then, becoming insolvent, failed to proceed. The defendant was called upon to complete the contract, but declined so to do. Plaintiff then completed the work called for by the subcontract. Thereafter he obtained a certificate that he had necessarily expended the sum of $15,361.46 in excess of $11,550, which was the balance that would have been due to the construction company had it completed the work. This certificate was signed "Stritesky & Sweatt, architects, by L. R. Stritesky." On February 13, 1907, plaintiff commenced this action, alleging substantially the matters hereinbefore stated. The defendant answered, denying certain of plaintiff's allegations, and affirmatively alleging that the architects' certificate was not given in good faith, but as a result of fraud and misrepresentation on the part of the

plaintiff and recklessly and without personal examination by said architects. The trial court, among others, made the following findings:

"That the said Stritesky thereafter made and delivered to the said Ilse such certificate, but said certificate was obtained through fraud and misrepresentation on the part of said August Ilse, and without the exercise by the said Architect Stritesky of his personal judgment with respect to matters certified about, and without any intent on his part that the same should be used as a final or permanent certificate.

"That the statement exhibited by the said Ilse to the said Architect Stritesky, and upon which his certificate was based, contained many overcharges and errors in favor of the said Ilse.

"That the certificate of the architect relied upon by the plaintiff in this cause as the basis of his suit, is wholly invalid and not binding upon the defendant by reason of the fraud and deception of the plaintiff through which it was obtained, and the plaintiff is not entitled to recover against the defendant."

After a trial on the merits, the action was dismissed by the trial court upon the ground that it had been prematurely brought, and the dismissal was made without prejudice to the bringing of another suit. Plaintiff appeals from the dismissal, and the defendant appeals from that portion of the judgment which makes the dismissal without prejudice.

It is urged by the plaintiff that the certificate of the architect must be deemed to be conclusive of the amount due the plaintiff, inasmuch as the contract expressly states that the certificate of the architects shall be conclusive between the parties. It is the general rule of law that parties to building contracts may agree that the certificate of an architect or an award by an arbitrator shall be a condition precedent to the right of action or conclusive as to the amount due on the contract. This rule is not without its exceptions. It has accordingly been held that the certificate or award must be made upon such knowledge of the subject-matter as to warrant an opinion binding upon the parties. This prin-

ciple finds expression in the cases of *Van Hook v. Burns*, 10 Wash. 22, 38 Pac. 763; *McDonald v. Lewis*, 18 Wash. 300, 51 Pac. 387, and *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142. This is consistent with the rule that a certificate may be impeached for fraud or for such gross mistake or error as would imply bad faith. To make a certificate without a proper knowledge of the fact, which upon investigation is found to be untrue, is equivalent in law to the making of a certificate known to be false. The result is the same. The one is an open fraud, the other the product of such bad faith as to operate as a fraud in law. In *Marks v. Northern Pac. R. Co.*, 76 Fed. 941, the court said:

"The constituting, by agreement of parties, of the engineer of the defendant company the umpire to ascertain and determine the amounts that should be due the contractors under the contract, . . . was accompanied by the presumption of law that the engineer should at all times, and in respect to every matter submitted to his determination, exercise an honest judgment, and commit no such mistakes as, under all the circumstances, would imply bad faith."

There has been much loose expression on the part of courts upon this subject, and many of them have seemingly held that the certificate once given cannot be questioned. There may be contracts so drawn, or the circumstances of the particular case may be such that this doctrine would apply, as for instance in the case of *Martinsburg etc. R. Co. v. March*, 114 U. S. 549, 5 Sup. Ct. 1035, 29 L. Ed. 255, where the contracting company had expressly bound the other party to accept as conclusive the estimates of its own engineer, and then sought to impeach his certificate. But here we have no such condition. Both parties were entitled to an honest award, and to hold defendant to answer in a sum clearly shown to be erroneous would deprive it of its legal rights. We do not think it was ever intended, in the absence of facts equivalent to an estoppel, to hold the certificate of an architect was anything more than a condition precedent to an action, or to afford an opportunity for settlement out of

court. For it is the policy of the law to favor contracts that will avoid litigation.

"When, therefore, a contract discloses nothing more than an agreement generally to refer any and all disputes to arbitration, it does not prevent the contractor from maintaining an action in court. It should not refer any and every matter to arbitration, but provide that the contractor shall not sue nor the company be liable until the engineer has determined the amount to be paid. To some this distinction may not be so apparent, and it has *not* been established without criticism. As Judge Martin once said in a case setting forth such a decision: 'If parties may arrange [agree] that before any action is brought an arbitrator [engineer] shall ascertain the sum to be paid, that seems to be only a circuitous mode of saying that no action shall be brought.' Yet the decision has been followed and is now well established that the parties to a contract may not oust the courts of their jurisdiction over the subject-matter of their contracts." Wait, Engineering and Architectural Jurisprudence, § 345.

In this case the certificate of the architect fixed an amount in excess of the amount actually due. This fact cannot be questioned. This condition was brought about through the probable mistake of plaintiff, concurring with the indolence or ignorance of the architect. It did not voice the honest judgment of the architect, and for that reason was liable to impeachment by either party. The court committed no error, then, either from the viewpoint of the fact or the law, in admitting evidence to impeach the certificate of the architect.

Plaintiff insists, however, that he should not suffer a judgment of dismissal because of this finding by the court. We would be glad indeed to so hold, if we could sustain our position by reference to principle or precedent. Some amount was due plaintiff, and this he might have recovered but for the unfortunate position he has voluntarily placed himself in. He began his action upon the theory, and maintained it throughout the trial, that the certificate of the architect was final and conclusive as to the amount due, and that the testimony offered by defendant to challenge the certificate was

incompetent to prove such fraud or mistake as would prevent a recovery. Defendant answering the complaint, challenged the certificate as fraudulent in law and, therefore, not binding upon it. No motion or demurrer was directed to this pleading. Plaintiff might then have raised the issue as to the reasonable value of his services, on the theory that, if the certificate was so grossly in error that it was not binding on the parties, he was still entitled to the value of his services in an amount to be ascertained by the court. Instead of doing this, he replied, denying the affirmative defense. He thus said that he would rely upon the certificate as given by the architect; that he would take the amount so certified or take nothing. It was his privilege to adopt either theory of the law, but in so doing he was bound to abide the consequences of his position. Had plaintiff been willing to raise the issue, the court would have no doubt proceeded to find the actual amount due, or, in other words, reject the false certificate and try out the issue on a *quantum meruit*. We would not be inclined to hold, for we cannot believe, that it is the law that parties, situated as the parties to this action were, should be compelled on either side to obtain another certificate as a condition precedent to the action. The effect of a reversal would be to send the case back for retrial upon a theory rejected by the plaintiff as long as the hope prevailed that he could recover on the certificate, thus putting this court in the somewhat peculiar position of defining the law in the first instance and directing the issue to be tried and the submission of evidence to meet it. To direct a trial on a *quantum meruit* we would have to direct an amendment of plaintiff's pleadings, ordering him to admit the fact that the certificate was wrong, a condition for which plaintiff's own mistake, coupled with the ignorance, incapacity, or wilfulness of the architect, was responsible. It would seem that we have no right to do this, although the true merit of the case was with plaintiff in the first instance. The conclusion we have reached is supported by the further fact that, while excep-

tions were numerous and plaintiff took exceptions to that part of the judgment holding the certificate invalid, no exceptions were taken to the order dismissing his action without prejudice.

For the reasons herein stated, the judgment of the lower court is affirmed.

[No. 8199. Department Two. November 4, 1909.]

JOE DEL NOTARO, *Respondent*, v. FLORA DOUGLAS, *Appellant*.[1]

APPEAL—REVIEW—FINDINGS. Findings in an equity case upon hopelessly conflicting evidence will not be disturbed on appeal.

TENANCY IN COMMON—PAYMENT OF TAXES—OFFSET. The value of the use of premises by a cotenant in possession may properly be offset against such tenant's claim for taxes paid.

QUIETING TITLE—DECREE—FORM—EFFECT. In an action to quiet title, in which both plaintiff and defendant claim full title to lands held by defendant, a decree quieting plaintiff's title to an undivided one-half interest has the effect to confirm defendant's title to the other half.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 20, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to quiet title. Affirmed.

Byers & Byers, for appellant.

Blaine, Tucker & Hyland, for respondent.

MOUNT, J.—The respondent brought this action alleging, that he was the owner of certain real estate in the city of Seattle; that he furnished the money to the appellant to purchase the land, and title was taken in the name of the appellant; that afterwards the appellant executed and delivered a deed to him for an undivided one-half thereof, but

[1]Reported in 104 Pac. 774.

refused to deed to him the balance of the land, and prayed for a decree adjudging him to be the sole owner of the land, and that his title thereto be quieted against the claim of the appellant. The appellant, for answer to the complaint, denied the allegations thereof, and alleged that she had purchased the property with her own funds, and that the whole thereof belonged to her; that she had deeded an undivided one-half thereof to the respondent for a certain consideration which had failed, and prayed for a judgment quieting title in her against the claims of the respondent. Upon a trial of the case to the court without a jury, the court found that the respondent advanced certain sums of money to appellant for the purchase of the property and that, after the purchase thereof by appellant, in pursuance of an understanding, appellant deeded an undivided one-half thereof to the respondent, and concluded that respondent is entitled to a decree quieting title as against the claims of appellant to an undivided one-half interest in said property, and entered a decree accordingly. The defendant has appealed from that decree.

The only questions presented in the case are questions of fact. It is argued that the court erred in not finding that the appellant purchased the property with her own funds and that the whole thereof belongs to her, and that in any event she should be reimbursed for one-half of the taxes and assessments paid by her against the property during the time she has been in possession thereof. We have carefully read all the evidence in the case and conclude that the decree rendered does substantial justice between the parties. The evidence upon the main questions in the case is in hopeless conflict. It is of such a character that we do not feel justified in disturbing the findings of the trial court thereon. It is true that the appellant has paid the taxes and certain assessments, but she has had the exclusive use of the property, and no evidence is offered as to the value of such use. But

the trial court was of the opinion that one offset the other, which is no doubt substantially correct.

Appellant complains because the trial court quieted title in respondent to an undivided one-half of the property, when no such order was made against respondent as to the other half. We think the effect of the decree was to quiet the record title in each of the parties as against the claims of the other.

The judgment will therefore be affirmed.

RUDKIN, C. J., PARKER, DUNBAR, and CROW, JJ., concur.

[No. 8123. Department Two. November 4, 1909.]

ARTHUR McKENZIE, *Respondent*, v. NORTH COAST COLLIERY COMPANY, *Appellant*.[1]

APPEAL—REVIEW—VERDICTS. The verdict of a jury upon conflicting evidence is conclusive on appeal.

MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE. Coal miners, who are paid extra for work in putting in props to protect the safety of the place, do not assume the risk of insufficient props where the work was done under the direction and control of a pit boss whose duty it was to supervise and inspect the work.

SAME—COAL MINES. The duty of a master to supply a safe place in which to work applies to a coal mine where the miners put in props to secure safety under the direction and control of a pit boss who supervised and inspected the work.

SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—SAFE PLACE. A coal miner is not guilty of contributory negligence and does not assume the risk of the unsafety of the place in which he works, where injury resulted from a condition at another place, and could have been discovered only by an examination which it was not his duty to make.

SAME—SAFE PLACE—DUTY OF INSPECTION—PLEADING AND PROOF. Under a complaint by a coal miner for negligence in not supplying a safe place to work, the walls of the mine having fallen in, evidence as to the master's duty to make an inspection is admissible, since the duty to furnish a safe place necessarily requires inspection.

[1]Reported in 104 Pac. 801.

SAME—FELLOW SERVANTS—PIT BOSS AND MINERS. A pit boss in a coal mine is not a fellow servant, but is a vice principal, of miners with reference to the putting in of props under his direction and control.

SAME—SAFE PLACE—PREPARATION BY OTHER SERVANTS. While the master is not an insurer, a coal miner working in one battery, and injured by the fall of walls in another battery where the propping was negligently done by other miners, may recover on the theory that the master guarantees the safety of the place to work prepared by him.

APPEAL—REVIEW—INSTRUCTIONS REQUESTED BY APPELLANT. An appellant cannot complain of contradictory instructions which should not have been given, where they were given at his request.

TRIAL—INSTRUCTIONS—ORDINARY CARE—PROVINCE OF COURT AND JURY. It is not error for the court to refuse to determine for the jury the exact standard of ordinary care, but it is sufficient to state the general principles of law governing the case.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $30,000 for injuries sustained by a coal miner twenty-four years of age, is excessive and should be reduced to $22,000, where it appears that both legs were paralyzed and he had lost control of his bowels and urinary organs, but that he was able to go about on crutches, and there was some hope for improvement, and the complaint limited his earning capacity to $150 per month.

Appeal from a judgment of the superior court for King county, Tallman, J., entered February 27, 1909, upon the verdict of a jury rendered in favor of the plaintiff for $30,000, for personal injuries sustained by an employee in a coal mine. Reversed unless $8,000 is remitted.

Kerr & McCord, for appellant.

Brady & Rummens and *Geo. H. Bailey*, for respondent.

DUNBAR, J.—This is an action for personal injuries, received by respondent while employed as a miner in the appellant's coal mine. The pertinent allegations of the complaint were as follows: That in order to render the chutes of said mine a safe place in which to work, it was necessary that the walls of said chutes, after the pillars of coal had been excavated, be pressed and held apart by means of timbers and

appliances; that on the 21st day of October, 1907, while the plaintiff was in the employ of the defendant and engaged in digging coal from the pillars at chute 14 between cross-cuts 2 and 3 in said mine, by reason of the negligence of the defendant in failing to provide the plaintiff with a safe place in which to work, by reason of its negligence in failing to keep the walls in and about chutes 12, 13 and 14 and between them and above the place where plaintiff was working, when the pillars had been drawn, securely timbered, braced, and held apart and in place, the coal, stone, and earth of said walls, above the place where plaintiff was working, without fault on the part of the plaintiff and without warning to him, gave way and fell down upon the plaintiff and crushed him, and caused the injuries thereafter alleged. The answer put in issue the charge that the defendant had failed to furnish plaintiff a safe place in which to work, and set up affirmatively assumption of risk, contributory negligence, and the negligence of fellow servants. The cause was tried to a jury, the defendant's motion for an instructed verdict was denied, and the trial resulted in a verdict in behalf of plaintiff for $30,000. A motion for a new trial having been by the court overruled and judgment entered, the defendant appeals to this court.

In order to make the complaint intelligible, it is necessary to give a brief description of the mine. The vein of coal lay at an angle of eighty-five degrees to the gangway. The vein being worked was nine feet thick. A slope had been driven down on the vein at a workable angle, and the coal was blocked off into squares in the usual way. The gangway was tunneled in from the side of the mountain, and from said gangway, at distances thirty-five feet apart, chutes five by six feet were driven up through the middle, a distance of about two hundred feet. These chutes were intersected every twenty-five or thirty feet by cross-cuts, four feet square. The cross-cuts were for the double purpose of admitting air

to the operatives and the removal of timber used in the propping of the mine. In removing the coal, two miners worked in each chute, beginning at the top of the upper cross-cut and working toward the main gangway below. Each miner removed the coal to the center of the block on his side of the chute. The props were set about three feet apart throughout the mine, and immediately above each cross-cut the miners built a battery to protect themselves against the fall of coal, rock, and debris which was constantly falling by reason of the squeezing and settling of the walls. Upon the removal of the soft coal at the center of the vein, the walls began to squeeze together and loosen the coal. It is conceded that no limitation was placed upon the use of timbers by the miners, and that the timber was furnished for that purpose.

While the record in this case is very voluminous and the disagreement of counsel as to what the record shows has necessitated a careful examination of the whole, and while the case is important not only by reason of its practical results on the coal mining business, but by reason of the size of the verdict, most of the practical questions involved have been settled by the verdict of the jury. For instance, on the question which seems to have been deemed vital by the learned counsel for appellant, viz., whether the falling mass which injured the respondent came directly from above battery B located just above cross-cut 4 in chute 14, or whether it started from chute 13 and on its descent bore westward and entered chute 14 above where respondent was working, there is a sharp conflict of testimony, and without stopping to review it, it is plain that there was competent testimony from unimpeached witnesses tending to establish each conflicting theory. This was admitted by counsel for appellant in his motion for an instructed verdict, when he stated that, under the proofs before the jury, the caving or falling of the coal, rock, and debris, through the falling of which respondent was injured, came either, under the proofs of the respondent,

from a point above battery B, or it came, as shown from the testimony of the appellant, from chute 18 in the mine. So that, whatever the responsibility may have been in either event, the case comes here on the legally established fact that the injury was done to respondent from coal and rock falling from a point above battery B, and therefore necessarily by reason of the breaking of battery B.

The same thing may be said of the condition of battery B, both before and after the accident. And so as to the notice that was given to Nesbit, the pit boss, of the dangerous condition of said battery B just prior to the time when the respondent commenced work in chute 14, and, also, during the time that he was working there. If the jury believed the testimony of Arthur Provence and Dan McKenzie, discarding altogether the deposition of Campbell McPherson, which seems to be a little contradictory, it would have been fully justified in concluding that the mass in question fell from battery B; that battery B was in a dangerous condition when respondent went to work in chute 14; that Nesbit, the pit boss, knew of this condition; that respondent did not know of it, but worked under the explicit charge and directions of Nesbit. And it has by its verdict said that it did believe their testimony in these particulars. So that they must be accepted here as the facts of the case.

It also appears from the testimony of the appellant, through its representative Nesbit, the pit boss, that it was his duty to inspect the mine where these men were working, and that the duty was his alone, as shown by the following excerpt from his testimony on cross-examination:

"Q. You go in there, don't you, Harry, for the purpose of seeing how the timbers and things are looking and how the batteries are and whether the place is safe, and whether the miners propped it up all right? A. Yes, to see that the men are working. Q. Yes, to see that they are doing it all right? A. Yes, sir. Q. It is not only to protect yourselves but to protect the working place of the mine? A. Yes, sir. Q. You were the only man that was doing that? A. Yes, sir."

It also appears from the testimony of respondent's witnesses that, while the miners did the timbering and set the props, such work was done under the direction and control of the boss, who passed upon its efficiency and sufficiency. That it was not a part of the men's work for which they received compensation is shown by the fact that what work they did of that kind the boss paid them extra for. In the light of these facts, there is no assumption of risk on the part of the respondent, and the court did not commit error in refusing appellant's motion for an instructed verdict.

The appellant insists that the doctrine of a safe place is not applicable to a coal mine, and relies upon *Smith v. Hecla Min. Co.*, 38 Wash. 454, 80 Pac. 779, to sustain that contention. But we think the trial court properly interpreted that case, and it does not appear from an examination of the opinion that it was the intention of the court to announce the bald rule that the doctrine of a safe place did not apply under any circumstances to a coal mine; but simply announced that, under some circumstances, it was the duty of the servant to investigate. The portion of the instruction which the court was criticizing in that case was as follows:

"It is sufficient to say, however, that the law does not under any circumstances exact from the servant the use of diligence in ascertaining such defects, but charges him with knowledge of such only as are open to his observation; beyond this he has a right to assume without inquiry or investigation that his employer has discharged his duty of furnishing him with a reasonably safe place in which to perform his duties,"

regarding which this court said:

"The meaning of much of this instruction is obscure. The last part thereof is clearly erroneous. The law *does* require the servant to use some diligence in ascertaining defects, and in protecting himself from the dangers to be reasonably apprehended therefrom—such diligence and care as a man of ordinary prudence would exercise under the same circumstances. He must, to protect himself from injury, use diligence commensurate with the dangers known by him to

be incident to the character and place of work wherein he is employed."

It would be doing injustice to the reputation of the court to conclude that it intended to make the announcement that under no circumstances would the doctrine of safe place apply to the operation of a coal mine. There can be nothing sacred about a coal mine, as such, which relieves it from liability under circumstances which would create a liability on the part of other employers. The court in the *Smith* case, *supra*, in the course of its argument, pointed out the fact that coal mining was known to be fraught with danger. But many other employments are also fraught with danger. In fact, it may be said that every employment is fraught with *some* danger. So that, after all, it is simply a question of degree, and the amount of care which the servant must exercise is equally a question of degree. The principle is the same in one employment as another, and the circumstances surrounding each particular case must be considered before it can be determined whether the servant can absolutely rely on the doctrine of safe place, whether he cannot rely upon it at all, but in staying in the employment assumes the risk, or whether the reliance upon the master and his own caution are to some extent mutual. There is such a dissimilarity in the way in which coal itself is mined that the same rule in regard to the assumption of risk cannot be applied. In mining a flat vein of coal, where the miner stands facing the breast of coal in which he is digging, one kind of danger is to be apprehended. But where he is digging in a vein which is nearly perpendicular, and is on the top of the coal, another character of danger may beset him. In this case, as we have seen, he was digging from the top of the chute down. The employment might appropriately be likened to the digging of a well, with the exception that that which he dug was taken out below instead of being hoisted above for exit. So that it might as well be said, in a case where the servant is injured through the alleged negligence of the master in not

maintaining safe appliances for hoisting, or in not making provision to prevent the caving of the earth in the body of the well, that the doctrine of safe place did not apply to well digging.

The first case cited by appellant, viz., *Roccia v. Black Diamond Coal Min. Co.*, 121 Fed. 451, we think does not sustain its contention. In that case the court laid down the rule, which is unquestionably correct, that if the workman exposes himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, as the court said: "He assumes the risk of the danger which he knows and appreciates." This decision followed the case of *District of Columbia v. McElligott*, 117 U. S. 621, 6 Sup. Ct. 884, 29 L. Ed. 946, where the same principle was announced. But what were the circumstances to which this rule was applied? The court said:

"Plaintiff in error was an experienced miner, and had been for years at work in the mine. It was his special duty to timber the mine and to look out for and remedy the very dangers which caused his injury. No one in the mine knew so well as he the perils to which in this particular occupation he was exposed. This is not a case where an employee, unaware of the perilous nature of his employment, remains at work under a request for or promise of assistance of the master, nor is it the case of one who was under disability or was incapable of estimating the danger. The dangers were such as in his regular employment it was his duty to deal with. They were confessedly visible and obvious to him. They were the natural result of the progress of the work of mining."

But in the case at bar, instead of being the special duty of respondent to look after the batteries and other supports, it was the special duty of the pit boss, not only according to the testimony of respondent's witnesses, but according to the admissions of the pit boss. Consequently the same rule could not apply. The next case cited, *Cully v. Northern*

Pac. R. Co., 35 Wash. 241, 77 Pac. 202, is equally inappropriate.

We cannot review all of appellant's cases within the appropriate limits of an ordinary opinion, but from an examination we think as a rule they fall as far short of sustaining appellant's contention as the case just above mentioned, in addition to the fact that many of them lay down rules on contributory negligence, master and servant, and the effects of promise to mend on the part of the master, which are opposed to the uniform holdings of this court. It must be borne in mind that there was no apparent danger here that was brought to the attention of the respondent. We are speaking now, of course, from the standpoint of the respondent's testimony. The condition of battery B was not discoverable from the place where the respondent was working, and the distinction must be borne in mind between an injury which occurs from a defect or a wrongful operation in the machinery or thing with which the servant is working, and an injury which is produced by contact with something which is disconnected from the work. Its condition could only be discovered by an examination, and it was not the respondent's duty to make such examination. Its dangerous condition had been disclosed to the pit boss by prior workmen, so that there seems to be no question of imminent or apparent danger in the case.

The appellant insists that testimony should not have been admitted tending to show the condition of the batteries, or the liability of the appellant for anything except the alleged negligence in allowing the walls to fall; and that there was nothing in the complaint upon which the testimony in regard to inspection could be based. But the duty of maintaining a safe place must necessarily carry with it the duty of making such inspection as is necessary to maintain the safe place. From the undisputed testimony, including the testimony of the pit boss, this case is brought within the

announcement made by the court in *Green v. Western American Co.*, 30 Wash. 87, 103, 70 Pac. 310, viz:

"The general duty is also imposed upon the operator to see that the working places in the mine where props are necessary to keep the mine from caving in are propped, and that the working places are frequently inspected to ascertain whether the props are put up; and to see that the workmen put up the props as their work progresses. A failure to do this is negligence."

It is true that was an action brought under the statute, but the announcement was of the general law. It is too well settled for discussion that the pit boss was not a fellow servant of respondent, but was a vice principal of the appellant.

So far as establishing the negligence of the master is concerned, it may be admitted that he is not an insurer, and therefore does not warrant the safety of his employees or his plant; but he must use reasonable precaution, and his duty to guard against defects or want of repair is a continuing one. Under the testimony in this case, we think the jury was warranted in finding that the appellant was guilty of negligence. Conceding that battery B had been constructed by the servants, it is admitted that it had not been constructed by the respondent, which brings the case within the rule announced in *Cheatham v. Hogan*, 50 Wash. 465, 97 Pac. 499, where it was said:

"When one servant of a master constructs a scaffold for a particular purpose of the master, uses it for that purpose and then leaves it standing, and the master afterwards directs another servant, who had no part in its construction, to use it for another purpose, the master adopts the scaffold as his own, and thereby guarantees that it is a safe place on which to work."

While in this instance the battery was used for the same purpose, the principle of responsibility is not thereby changed.

The appellant urges error in the giving and refusing to

give certain instructions. The instructions given and proffered are very lengthy, and we do not feel justified in setting them forth here. But from an examination of them, we are not prepared to say that reversible error was committed. The instructions of the court stated the law correctly and, while it is true that some of the instructions are in a sense contradictory, the contradictory instructions were asked for by appellant, and plainly should not have been given under the established facts of the case. But the appellant, having asked for erroneous instructions, cannot complain because they were contradictory.

Counsel for appellant earnestly insists that the court erred in refusing to instruct the jury exactly how far the doctrine of safe place applied to coal mining cases, but this was requiring more of the court than the law requires of it. It is not practical for a court to enter into particulars in instructing a jury. Its duty is to announce general principles applicable to the issues, and the jury must apply them to the particular facts proven in the case. For instance, the court instructed the jury as follows:

"In determining that degree of care which the defendant was required to use, you should determine it by the standard of ordinary care; that is, by that degree of care which a reasonably safe, careful, prudent, cautious, skillful and competent coal mine operator would use to protect his employee from the dangers of the character which injured the plaintiff."

This was a proper announcement of the law, and the test given was the test of ordinary care. The court could not proceed to tell the jury that a reasonably careful, prudent, etc., coal mining operator should inspect the coal mine every day or every two days, and tell it just what a sufficient inspection was. These are determinations to be made by the jury after applying the principles of law given by the court to the facts proven. Considering the whole case, we are unable to determine that any prejudicial error was committed by the court in the trial of the cause.

The contention is also made that the verdict is excessive, the result of passion and prejudice. This is always a difficult proposition for the court to deal with, for so many elements enter into the attempted calculation which are not susceptible of calculation at all. When we go beyond an estimate of what would constitute a comfortable or reasonable provision for life for the injured or disabled person, and undertake to compensate for pain, embarrassment, or mental anguish of any kind, we enter the realms of conjecture and speculation; for what would embarrass a person of one temperament, or of one character of mental endowment, would not affect another who was either possessed of a different temperament or was philosophical enough to disregard it. That which would produce the keenest mental anguish in a sensitive nature would have but little effect on one of a coarser mould, and of less refined nature. In spite of these difficulties, however, the doctrine is well established that these are elements of damage which may be taken into consideration. So that all the court can do is to see that the jury approximates a sane and temperate estimation, taking into consideration the feelings of the ordinary person as we can best understand them.

The respondent was twenty-four years old at the time of the accident. That he is a helpless cripple for life is probably established. At the time of the trial he was able to go about on crutches, both of his legs being paralyzed. But the doctors testified that there had been some slight improvement since the first shock and, while they testified in substance that the chances of permanent improvement were very slight, there is still some hope, under their testimony, of considerable improvement. According to his own testimony, he labors under the embarrassment of having no control of his bowels or urinary organs. Whether this difficulty will be alleviated in any degree is problematical. Considering the testimony of the physicians and the tendency of nature to work cures, we

think there is room for the indulgence of hope in this particular. According to the concensus of calculations made by standard mortuary tables, his expectancy was, from the time of the accident, about thirty-eight and one-half years. The complaint limited the amount of his earnings to $150 per month. It is true he was earning about seven dollars a day when he was hurt, but this was under specially favorable circumstances so far as compensation was concerned. There is no reasonable probability that he could continue through life to find so remunerative an employment. Neither does the calculation take into consideration the probability that an ordinary man would not, for so long a time, be permitted by the ordinary vicissitudes of life, or even by his own inclination, to work every day in the month for so long a period. So that there must be a common sense application of these tabulated calculations. Taking into consideration the amount of money expended by the respondent in attempting to effect a cure, and the presumably permanent condition in which we now find him, we think that an available interest on $22,000, after deducting his legitimate expenses, would, under all the circumstances, be a reasonable compensation; and we therefore reduce the verdict to that amount. If the respondent remits the amount of $8,000 from the judgment within twenty days from the receipt of the remittitur in the trial court, the judgment will be affirmed; otherwise it will be reversed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8148. Department Two. November 4, 1909.]

WIELAND BROTHERS, *Appellant*, v. CHLOPECK FISH COMPANY, *Respondent*.[1]

SALES—CAVEAT EMPTOR—INSPECTION AND CARE—ESTOPPEL. Where 100 barrels of fish were purchased from packers in December and ordered stored in a warehouse, upon the packers stating that they could not hold them until the expected shipping date, January 15, and the packers delivered the fish after inspecting them according to the ordinary custom, and agreed to have them looked over at intervals while in storage for leakage, the principle of caveat emptor applies, in the absence of fraud; and the duty of inspection and care after January 15 devolved upon the purchaser, who cannot recover for spoiled fish where most of the lot was kept in the storage until June and not examined until August, part of a shipment in April having been found to be spoiled, and it being more difficult to keep fish untainted in the summer than in the winter season, and that strengthening of the brine was generally necessary.

Appeal from a judgment of the superior court for King county, Tallman, J., entered January 8, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for damages. Affirmed.

McClure & McClure, for appellant.

Kerr & McCord, for respondent.

DUNBAR, J.—Plaintiff is a corporation engaged in business as a wholesale fish and provision dealer in San Francisco, California. Defendant is a corporation engaged in catching, packing, curing, and selling fish at wholesale, in Seattle, Washington. For a number of years prior to the dealings out of which this suit arose, plaintiff had been a constant patron of the defendant, and all the transactions had been satisfactory. On July 27, 1906, plaintiff wrote to the defendant asking for quotations on sockeye salmon bellies. Under date of July 31, 1906, defendant replied, quoting

[1]Reported in 104 Pac. 789.

prices. On August 3, following, plaintiff placed an order for seventy barrels of sockeye salmon bellies, ten barrels to be delivered immediately and sixty barrels to be held for future shipment. In acknowledging receipt of this order, defendant wrote to plaintiff as follows, under date of August 7:

"We are in receipt of your favor of the 3rd inst., and contents carefully noted. We are shipping you on the Steamer Pueblo, which sails from here tomorrow, ten barrels of Blood Red Sockeye Bellies, which run about 225 pounds to the barrel. Upon receipt of these bellies we wish you would personally examine same and advise us the result of your examination," etc.

Ten barrels were duly received and found to be in good condition. On the 14th of August, defendant wrote and telegraphed plaintiff as follows:

"We have received your favor of the 7th inst., also 10 barrels Sockeye Bellies, and wired you immediately: 'Bellies received. Reserve for us 100 barrels.' And hope that you will be able to reserve us instead of 60 barrels 100 barrels. If you cannot reserve us 100 barrels, then by all means 60."

On the 17th this letter was answered by stating briefly that plaintiff would do its best to comply with the request, and it was complied with. On November 21 the plaintiff wrote defendant as follows:

"We are pleased to note that you have reserved us about 200 barrels Chum Salmon. We think that we will be able to have them shipped by about the 15th of January, perhaps sooner. We expected to be in our new place by the 1st of January, but everything goes so slow here and we have to have patience therefore. Kindly advise us how many barrels of Sockeye Salmon Bellies you have reserved for us," etc.

Defendant replied to this letter September 28:

"We are in receipt of your favor of the 25th and note what you say in regard to reserving the Salmon Bellies. In regard to the 200 barrels of Chum Salmon, we do not see how it would be possible for us to hold until after the 1st of January. We are going to rebuild our cold storage plant

and salteries and will commence some time during next month. We have got to have all our stock cleared out before we can pull down the building and we are anxious to get all our stock reduced to a minimum. We hope you can make some arrangements to take care of the 200 barrels at an earlier date than mentioned in your letter;"

with some further correspondence concerning the sockeye salmon bellies.

On receipt of this letter and under date of December 1, plaintiff wrote to defendant as follows:

"We have your favor of the 28th inst., from which we note that you have to clear your present premises by the first of January and that you therefore cannot hold the Chum Salmon or Sockeye Salmon Bellies for us. This being the case you will please store for our account as soon as you need the room in the Eyres Storage & Distributing Co. Warehouse, 200 barrels Chum Salmon, 100 barrels Sockeye Salmon Bellies";

with instructions to insure, etc. Defendant accordingly stored with Eyres Storage & Distributing Company, for plaintiff, two hundred barrels of Chum salmon and one hundred barrels of salmon bellies, and under date of December 8, 1906, notified the plaintiff of that fact, sending it the invoice, insurance policies, and warehouse receipts, stating:

"We have had these goods carefully stored and every package carefully examined after being delivered to the warehouse and we are satisfied that you have got a lot of first-class fish. We will have them looked over at intervals while they are in this warehouse to see that no leakage occurs."

In April, 1907, plaintiff withdrew from the warehouse ten barrels of salmon bellies, and on the receipt thereof in San Francisco, found one of them spoiled. In June, 1907, plaintiff received in San Francisco the remaining ninety barrels of salmon bellies and, after having stored them there until August, upon examination thereof found fifty-six of them spoiled. Suit was brought to recover the value of the fifty-seven barrels of spoiled salmon bellies, and storage, freight, and transportation charges thereon.

There is no substantial conflict in the testimony. The law of *caveat emptor* in sales of personal property is to the effect that the purchaser buys at his own risk, unless the seller gives an express warranty, or unless the law implies a warranty from the circumstances of the case or the nature of the thing sold, or unless the seller be guilty of fraudulent misrepresentation or concealment in respect to a material inducement to the sale. There is no showing that there was any fraudulent misrepresentation in this case. Is the purchaser brought within the rule of *caveat emptor?* The court made findings of facts in favor of the respondent, and found the law in its favor also, and rendered judgment for respondent for costs.

The contention of the appellant seems to be that, under the circumstances of this case, the duty of inspection devolved upon the respondent during the time the fish remained in the warehouse subject to the order of the purchaser, and that is the pivotal question in the case. It appears from the testimony that, when these fish were purchased by the respondent, it examined carefully twelve or fifteen barrels and then examined every third barrel, and it seems that this was the ordinary custom of examining fish in such cases. It is true that the respondent stated that it would have the fish looked over at intervals while they were in the warehouse to see that no leakage occurred, but this could only be construed as a promise to look over them until the middle of January, at which time the appellant had notified respondent that it would be ready to remove the fish. It would seem to us that the duty of inspection would cease at that time, and that it would be unreasonable to hold it was the duty of the respondent to take notice of the location of the fish after that, or to burden itself in any way with them. It does not appear that the respondent was ever notified, at the time the appellant sent for a partial shipment of the fish in April, that there was anything the matter with the fish. In fact, it did

not exercise ordinary prudence itself in having the remainder of the fish examined, but kept them still in storage until June following their storage, and then stored them in San Francisco, and made no examination of them until in August, eight months after they had been purchased.

It was testified by the experts that it was generally necessary about every six months to strengthen the brine on fish by adding salt to the same. It was also testified that an excess of salt in the preparation of salmon bellies, in the language of the witness, "burned them out," and made them tasteless. It is also in evidence that it is harder to keep fish untainted in the summer time than it is in the winter, and the fact that these fish were left by the purchaser uncared for until the winter season had passed and far into the succeeding summer, without making or causing to be made any examination and without even requesting the respondent, from whom it bought them, to make any examination, forecloses it from complaining that the fish were damaged through the fault of the respondent. The testimony as a whole satisfies us that no fraud was perpetrated or attempted by the respondent in the sale of these fish, and that any neglect which induced the spoiling of the fish was attributable to the action of the purchaser, the appellant in this case.

The judgment is therefore affirmed.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8425. Department One. November 4, 1909.]

THE STATE OF WASHINGTON, *on the Relation of Marvin L. Arnold, Plaintiff*, v. JOHN R. MITCHELL, *Judge of the Superior Court for Thurston County, Respondent.*[1]

ELECTIONS—PRIMARY ELECTIONS — STATUTES — IMPOSSIBLE CONDITIONS. Laws 1909, p. 174, § 4, amending the direct primary law, Laws 1907, p. 464, § 12, so as to require each elector voting at a primary election to declare his party affiliations, and providing that he shall receive the ballot only of the party for which he registered, is void as requiring a condition impossible of performance; the registration law making no provision for registration of party affiliations.

STATUTES—TITLE AND SUBJECTS—ELECTIONS. Laws 1909, p. 174, § 4, entitled an act relating to primary elections and amending certain sections of the direct primary law, and which amends Laws 1907, p. 464, § 12, is void as an amendment of the registration law, in so far as it requires the registration of the elector's party affiliations to entitle him to vote at a primary election, in that there is no reference in its title to the subject of registration, as required by Const., art. 19, § 2, and no reference to Laws 1907, p. 464, § 12 amended by the act.

ELECTIONS—STATUTES—IMPLIED REPEALS. Laws 1909, p. 174, § 4, amending the direct primary law, Laws 1907, p. 464, § 12, so as to require the registration of the elector's party affiliations, does not impliedly repeal Bal. Code, § 1455, explicitly providing the mode of registration, as it is not a complete act on that subject and repeals by implication cannot be invoked piecemeal.

STATUTES—AMENDMENTS—TITLES AND SUBJECTS—ELECTIONS. Laws 1909, p. 174, § 4, amending the direct primary law, Laws 1907, p. 464, § 12, so as to require the registration of the elector's party affiliations in order to vote at a primary election, is void as an amendment to the registration law, Bal. Code, § 1455, in that it does not set forth the section in full as amended and is not a complete act upon the subject of registration.

Certiorari to review a judgment of the superior court for Thurston county, Mitchell, J., entered October 22, 1909, upon sustaining a demurrer to the application, denying a

[1]Reported in 104 Pac. 791.

writ of mandate to compel a city clerk to register the name of the relator upon the poll books. Affirmed.

Gordon Mackay, for relator.

W. V. Tanner, *John M. Wilson*, and *George R. Bigelow*, for respondent.

CHADWICK, J.—The relator filed an application for a writ of mandamus directed to the city clerk of the city of Olympia, in the superior court of Thurston county, charging that the city clerk had refused to register him as a member of the republican party, and that, by reason thereof, he would be deprived of his privilege of participating in the primary elections for the year 1909, to be held under the provisions of the direct primary law. The superior court refused to issue the writ. The case is here upon a writ of review directed to the lower court.

In a most laudable endeavor to correct an existing abuse, the last legislature altered § 12 of the direct primary law passed in 1907 (Laws 1907, p. 457, ch. 209). Section 12 was changed to read as follows:

"Every qualified person, properly registered as a voter in the election precinct enabling him to vote at the ensuing election where registration is required, and every qualified person in precincts where registration is not required, shall be entitled to participate in the primary election. When he desires to vote at said primary each elector shall have the right to receive the ballot only of the party for which he registered if living in a precinct in which registration is required, or if living in a precinct in which no registration is required the ballot of the party for which he asks; . . ." Laws 1909, p. 174, § 4.

The change occurs in the last clause. As originally passed the law read: "When he desires to vote at said primary each elector shall have the right to receive the ballot and only the ballot of the party for which he asks." At the time of the enactment of the primary law in 1907, and at the time of the attempted amendment, there was upon the statute books a

complete act covering the whole subject of registration. Bal. Code, chap. 7, §§ 1445-1464 (P. C. §§ 4905-4908, 4890-4904). It makes explicit provision for the manner of registration even to the arrangement of the poll books and the matter to be entered therein, viz:

"Date of registration; name; age; occupation; place of residence; place of birth; time of residence in the state, county, ward and precinct, and if of foreign birth, name and place of court and date of declaration of intention to become a citizen of the United States, or date of naturalization, and with column for signature and one for remarks, and one column for checking the name of the voter at the time of voting." Bal. Code, § 1455 (P. C. § 4895).

It will be seen that no reference is made to the party affiliation of the elector, nor is a disclosure upon that subject within the remotest purview of the law. Indeed, we do not understand that it is so contended. The titles of the primary law and of the amendatory act do not differ. They read: "An act relating to, regulating and providing for the nomination of candidates for public office in the State of Washington and providing penalties for the violation thereof." The new act of 1909 bears the same title with the addenda, "and amending sections 1, 2, 3, 5, 10, 13, 22, 29, 30, 33, and 38, . . . of an act relating to," etc., repeating the original title. *It will be observed that section 12 is not mentioned in the title of the act.* The trial court held the amendment to section 12 of the primary law to be ineffectual to accomplish its purpose, and unconstitutional.

From the statement of the case it may be seen that the judgment of the lower court must be sustained. But this court is nevertheless required by the organic law to state the grounds of its decision. The act of 1909, in so far as it says that the electors shall have the right to receive the ballot only of the party for which he registered, cannot be sustained, because it puts upon the voter a condition that is impossible of performance, and denies him a present right guaranteed by the constitution and exercisable except as limited by proper

statutory enactment. The amendatory act of 1909 does not, and under its title could not, provide for registration. Therefore the voter who has complied with the general law upon that subject would be met at the polls with a condition impossible of performance, for whatever the election officers may decide with reference to the primary law, the registration officer is bound by the terms of the registration law and cannot attach any condition not therein provided. Had the legislature said in this act that no voter should cast a ballot who at the time of registration had not declared property of the value of $1,000, we would have an analogous case. No provision is made in the registration act for such declaration, and certainly it cannot be contended that the legislature can bind an elector to a condition precedent without making some provision for the manner and place of performance.

If the act of 1909, in so far as it refers to section 12, be an attempted amendment of the registration law or of the primary law, it is void because there is no suggestion of an amendment to the registration law, or that section 12 of the primary law is to be amended in the title of the act. Perhaps the most salutary provision in our state constitution is section 2, art. 19: "No bill shall embrace more than one subject and that shall be expressed in the title." In it the people have found their most potent weapon against vicious legislation. It is a declaration that truth must go before, shedding its light upon every legislative act. It makes the title speak the object of the law. A wholesome statute, if declaratory of a subject not within the title, must fall before it, for it is general in its application. While it is intended as a guard against the bad in legislation, it is also intended as a herald of the true intent and purpose of the law. It is not within the power of the courts to declare a law which is passed in contravention of this mandate wholesome because it is so. If this power were exercised, it would result in a direct violation of the constitutional mandate and a usurpation of the functions of the legislature on the part of the courts. Laws would

be sustained or defeated by considerations of present policy rather than by reference to the constitution. It is not possible within the limits of this opinion to cite the authorities in support of this rule. We shall, therefore, pass it as axiomatic.

It cannot be sustained as a repeal of Bal. Code, § 1455 (P. C. § 4895). Repeals by implication are not favored, and while laws have been held to be repealed by implication, it is generally done when a complete act is passed, covering the subject-matter of an existing act. There must be an irreconcilable repugnancy between them, or a manifest intent to repeal all prior acts upon the same subject. *Leavenworth v. Billings*, 26 Wash. 1, 66 Pac. 107; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91. To bring this law within that rule, we would be compelled to hold that the amendment repealed all of § 1455, thus leaving nothing of the registration law but a declaration of party principles. Repeals of statutes by implication are not to be worked piecemeal. There must be some certainty and security in the law. If we should adopt this theory to sustain the one, we must, under accepted rules of construction, kill the other. The mere statement of this proposition shows its fallacy, and needs no further discussion.

The act, if treated as an amendment to the registration law, falls squarely within the rule of *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769. In that case the additional exemption statute of 1897 was declared to be in contravention of § 37, art. 2, of the constitution. It is there provided that no act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length. In that case, as in this, no mention was made of the act against which an amendment was worked. The court said:

"The section in question, it seems to us, is not complete in itself. It does not purport to add an additional section to the statute relating to exemptions of personal property, but purports to, and does, ingraft into the section of the existing

statute providing for such exemptions an additional exemption which alters its scope and effect. As such it is clearly amendatory of that section, and, to comply with the constitutional requirement, it should have set forth the section amended at full length. *Bierer v. Blurock*, 9 Wash. 63, 36 Pac. 975. This view of this act was taken by the learned judge of the district court of Washington in construing the exemption statutes of this state with relation to the national bankruptcy act. With reference to the question he said: 'A statute which is complete in itself is not repugnant to the provision of the state constitution above quoted merely because it changes the existing laws of the state, and by implication repeals prior enactments relating to the same subject. *Warren v. Crosby* (Ore.), 34 Pac. 661. But where, as in this case, the new act is not complete, but refers to a prior statute, which is changed, but not repealed, by the new act, so that the full declaration of the legislative will on the subject can only be ascertained by reading both statutes, the very obscurity and the tendency to confusion will be found which constitute the vice prohibited by this section of the constitution.' *In re Buelow*, 98 Fed. 86."

It will thus be seen that the attempted amendment cannot be intelligently applied without reference to the registration law, of which there is no notice either in the title or the body of the amendatory act. In its attempt to meet a condition the legislature has stopped short of its purpose, and its endeavor must be held to be ineffectual until a proper amendment is made to the registration law making compliance with the later law possible.

The judgment of the lower court is affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8408. Department One. November 5, 1909.]

In re Third, Fourth and Fifth Avenues, Seattle.[1]

Appeal—Review—Findings—Municipal Corporations — Assessments. Findings on conflicting evidence as to the extent of the district and the benefits from a local improvement assessment, will not be disturbed unless the evidence so clearly preponderates as to show abuse of discretion, and an arbitrary or manifestly oppressive judgment.

Municipal Corporations—Assessments—Reasonableness. The amount of previous assessment is immaterial on the question of the reasonableness of an assessment.

Same—Reassessments—Interest. Upon a reassessment, interest on the amount of the condemnation awards is properly added.

Appeal from an order of the superior court for King county, Frater, J., entered April 19, 1909, confirming an assessment roll, after a hearing before the court without a jury. Affirmed.

Charles A. Riddle, for appellants.

Scott Calhoun, for respondent.

Morris, J.—This cause was once before this court, and the primary facts and the ruling of the court thereon may be found in 49 Wash. 109, 94 Pac. 1075, 95 Pac. 862. Upon the cause being remanded as directed by this court, the city filed a supplemental petition, and an order was entered thereon directing the eminent domain commissioners to prepare a new assessment roll, to cover the awards of damage, with accruing interest and costs. Upon the filing of the new assessment roll, many objections were made thereto, and upon a hearing of these objections, the court below entered an order confirming the new roll, and this appeal is taken by the objectors Stirrat & Goetz Investment Company and Moore Building Company.

The objections are to the effect that the lands of these

[1]Reported in 104 Pac. 799.

objectors are not benefited; that the assessment was made arbitrarily, unreasonably, and under mistake of material fact; that a large amount of property has been specially benefited by this improvement which has not been included in the assessment roll; that the property of objectors did not abut upon any of the streets included in the improvement, and that during the past six years said property has been assessed for various public improvements in an aggregate of $29,000.64. The appeal presents no new question. We have decided so frequently that it ought to be regarded as settled that where there is a conflict in the testimony as to the proper extent and boundaries of the district within which property is specially benefited by any local improvement, or what should be the proper assessment upon a given lot, this court will not disturb the findings of the lower court unless the evidence is so clearly predominating as to indicate that the trial court has lost sight of its judicial discretion in determining its judgment, and its judgment is arbitrary and manifestly oppressive. No other rule could or ought to obtain. *Seattle v. Felt*, 50 Wash. 323, 97 Pac. 226; *In re Seattle*, 50 Wash. 402, 97 Pac. 444. We find nothing in this record to justify us in concluding that this case calls for the announcement of any other or further rule.

It was immaterial that the lot in question had been assessed in a large amount for other improvements. The only question to be determined was, could it be, and was it properly, assessable as receiving a special benefit from this improvement. Upon the question of interest being added to the condemnation awards, we have heretofore held that such awards bear interest. *State ex rel. Donofrio v. Humes*, 34 Wash. 347, 75 Pac. 848.

The order of the lower court in confirming the assessment roll is affirmed.

RUDKIN C. J., CHADWICK, FULLERTON, and GOSE JJ., concur.

[No. 7601. *En Banc.* November 5, 1909.]

ALOF NORDSTROM, *Appellant*, v. SPOKANE & INLAND EMPIRE RAILROAD COMPANY, *Respondent*.[1]

MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS—KNOWLEDGE OF CONSEQUENCE. A lineman of ordinary intelligence and six years' experience, who had previously worked in iron or steel mills, assumes the risk from sawing iron lugs from insulators supporting a trolley wire, whereby iron dust was thrown into his eye, that being a common happening during six days' work in sawing lugs; and, with knowledge of such danger, he cannot plead ignorance of the fact that the consequence might be the loss of his eye.

SAME—SAFE PLACE—ANTICIPATION OF DANGER—ASSUMPTION OF RISKS. Where a lineman, sawing iron lugs from insulators supporting a trolley wire, was injured by iron dust thrown into his eye, the master is not liable for failing to supply a safe place in which to work in that the tower car was not high enough to bring the lineman's eyes above the lugs and out of danger from flying iron dust, where it appears that, owing to the unevenness of the track, the lineman on the tower would sometimes be above and sometimes below the lugs, and the plaintiff worked six days and made no complaint, although dust in the eyes was a common occurrence and the danger was as well known to the servant as to the master; since, in such a case, the servant assumes the risks of obvious dangers respecting the safety of the place, and the master is not liable if the danger is so unlikely to happen that it would not be anticipated by the ordinarily prudent man, whether master or servant.

RUDKIN, C. J., FULLERTON, GOSE, and DUNBAR, JJ., dissent.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 24, 1908, upon sustaining a challenge to the sufficiency of the evidence, dismissing an action for personal injuries, after a trial before the court and a jury. Affirmed.

Robertson & Rosenhaupt, for appellant.

Graves Kizer & Graves, for respondent.

MORRIS, J.—The respondent was constructing an electric railway from Spokane to Waverly, and the appellant was in

[1]Reported in 104 Pac. 809.

its employ as a lineman. It having been discovered that the insulators used in the holding of the trolley wire were defective, in that the lugs were too large, the linemen were instructed to saw them off. In doing this work the linemen worked in pairs, standing upon the tower cars and using a hack saw, one man sawing the lug on the right, and the other sawing the lug on the left of the insulator. In order to hurry the work along, the men worked overtime, for which they were correspondingly paid; and when it became too dark to see otherwise, they were in the habit of using a lantern, hanging it upon the trolley arm in such a way as to cause its light to shine on the lug. The men had been engaged in this work about five days, and they seemed to have had more or less trouble with the steel dust released in the sawing flying in their eyes, causing them annoyance, discomfort, and ofttimes pain. Whenever the dust would fly into the eye of one of the men, he would remove it himself, or obtain the assistance of his fellow workmen, or, if not then successful in obtaining relief, a trip would be taken to Spokane, and the services of an oculist obtained. The fact of the saw filings or dust getting into the eyes of the men was frequently discussed among them at their boarding house, where they often assisted one another in its removal from the eye. The plaintiff was twenty-six years old and had been employed as a lineman for about six years. Previous to that he had worked in roller mills and sawmills for about two years, and seems, so far as we can gather from the record, to have been a man of ordinary intelligence and knowledge of human affairs.

On October 24, at about six in the evening, while, with his fellow lineman McCoy, he was sawing a lug, some of the particles of steel released in the sawing flew, or were blown, into his right eye. He and McCoy endeavored to remove them, but being unsuccessful and plaintiff suffering pain, on the following day a trip was taken to Spokane and an oculist consulted. Plaintiff was under treatment until December 15,

when the right eye was removed, the oculist being unable to reduce the inflammation and save the eye. Thereafter this action was commenced, resulting in the sustaining of a challenge to the sufficiency of the evidence and consequent dismissal. Error being alleged in the ruling of the court below in sustaining this challenge, the case is brought here on appeal. The complaint avers the negligence of the defendant in, (1) directing the plaintiff to work in a dangerous place, without notice or instruction as to the danger; (2) in failing to furnish a proper tower car so as to raise the eyes of the lineman above the insulator; (3) permitting plaintiff's co-employee to saw on the insulator opposite him and throw dust into his eyes; and (4) in failing to supply plaintiff with glasses or goggles.

The case is somewhat novel in the history of the manner in which the injury was inflicted; but, although the industry of counsel and our own research have failed to find a parallel case, we think it yields as readily to the well-known and recognized rules of law applicable to the relation of the master and servant as if it were a matter of common occurrence. When the relation of the master and servant is sustained, the law implies and fixes upon each certain duties and responsibilities, which are reciprocal in their nature. These duties, in so far as they relate to the case before us, are that the master shall furnish the servant with a reasonably safe place in which to work, and shall take the precaution of an ordinarily prudent man in keeping the place reasonably safe. He shall furnish the servant with proper tools and appliances that are reasonably safe for the use required of them, and use ordinary care in so keeping them. He shall, in case of any latent or hidden danger known to him and unknown to the servant, apprise the servant of the existence of such danger and the possibilities of consequent injury, and he shall employ such only as have sufficient intelligence to comprehend the danger, if any, of the situation. Having thus acted, he has fulfilled his full duty to his servant, and the

servant in his turn takes upon himself the obligation of using such care and precaution for his own safety as an ordinarily prudent man would use under like circumstances, and assumes the risk of injury from obvious and apparent dangers; and the same force of reasoning which holds the servant to assume the risk of only obvious and apparent dangers, releases the master from liability from dangerous conditions or situations of which he has no knowledge, or of which he could not acquire knowledge in the exercise of ordinary diligence on his part.

Labatt states the rule thus:

"A person is not . . . answerable at law for a failure to avert or avoid peril that could not have been foreseen by one in like circumstances, and in the exercise of such care as would be characteristic of a prudent person so situated. In other words, it is not negligence to fail to provide against an accident of such a nature that nobody could have foreseen it, and that no prudence could have anticipated the need of guarding against it." 1 Labatt, Master & Servant, §142.

The rule has been recognized in this court, and is thus succinctly stated in *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089:

"Where an employer places a guard sufficient to protect against all dangers reasonably to be anticipated, he is not guilty of negligence because the guard fails to protect against an unforeseen danger . . ."

The proximate cause of appellant's injury was the iron dust, released by his own saw or that of his fellow lineman McCoy, either being blown into his eye by the wind or propelled and thrown by the movement of the saw. It appears that this was a common happening. The linemen frequently assisted each other in removing this dust from their eyes; they talked about it while not at work; they apparently all knew about it and realized the probability of its occurrence. It was then, in so far as it was a danger, an open, apparent, and obvious one. It was a danger naturally incident to the work being done. It was one of the usual and ordinary

risks of such employment, and, as such, fell within the character of risks assumed by the servant. It will not do for the servant to say that, while he knew the flying dust would enter his eye, he assumed it would only cause momentary discomfort or pain, or at the most necessitate a visit to an oculist. There is a plea of knowledge of the danger, but not of its consequences, a doctrine which the law does not recognize. A man might as well say he knew, if his hand came in contact with a moving saw, it would cause him pain and injury, but he did not realize it might cause the loss of his hand. Knowledge of danger is in law knowledge of the injurious results naturally and proximately flowing from that danger.

Appellant is a man of ordinary intelligence, of some experience in sawmills, iron or steel roller mills, and six years as a lineman working upon telephone, telegraph, and other electric current wires. It must be a matter of common knowledge to such a man that sawing iron lugs would create iron dust; that this iron dust would fly with the wind, or be thrown or forced by the movement of the saw; that flying dust would enter the eye if sufficiently near; that iron dust entering the eyes might result in an injury the nature and extent of which, from the well-known delicate structure of the eye, no man could foresee. We, therefore, believe this case falls within the rule of assumed risks, and hence the appellant cannot recover.

Considering the case now upon the contention of appellant that the place was not reasonably safe: This could only be on the theory of some hidden, latent, or lurking danger, known to the master and not known to the servant, which it was the master's duty to warn his servant against, a most admirable rule when properly applied. This cannot be predicated upon the fact that the tower car was not a proper car. It is true, owing to the unevenness of the track, the roadbed not being completed, the car would be at different heights, so that the eye would sometimes be above, sometimes on the level with, and sometimes below the lug; but this

was well known to the appellant. There was no complaint made to the respondent. The men evidently anticipated nothing from this, other than the inconvenience from working at the different levels. Or, if it could be said to be a defect, it was as well if not better known to the appellant than to the respondent. It was respondent's first venture in work of this character. It had no knowledge of the defects, if any, except as appellant and his fellow workmen might have made complaint. No complaints, however, seem to have been made in this regard. If it be said that it was respondent's duty to know that the tower car was too low, or too high, whatever the defect might be, its duty in this regard, if a duty, could only have been to inform appellant of that which was already well known to him. Continuing to use the defective car, with full knowledge of the defects, making no complaints, relying upon no promise to remedy or repair, he again falls within the rule of assumed risk.

An analogous case upon this contention of appellant is that of *Detroit Crude Oil Co. v. Grable*, 94 Fed. 73. The facts in that case, so far as necessary to illustrate the point of law involved, were these: Standing close to an engine, the flywheel of which was held in place by bolts with protruding heads, was a water pipe. The vibration of the engine caused a similar movement of the water pipe, this condition being known to the engineer. The protruding bolts on the flywheel struck the water pipe, breaking it, and the engineer was injured by pieces of the broken pipe. The theory of recovery was that, while the engineer knew that the protruding bolts were dangerous, he did not anticipate or know that they might break the water pipe, and thus injure him. The court, in dealing with this situation, expressed itself as follows:

"The contention by which it is sought to sustain the judgment of the court below is that the servant did not anticipate being hurt in the way he was. It is said that the danger of this character of accident was not anticipated, and the risk of it not, therefore, assumed. . . . The duties of the servant brought him in daily contact with the machinery, and fur-

nished him a constant opportunity to inspect the same. His means of knowledge were evidently superior to those of the master. Notwithstanding that the defect was open, patent, and constant, and the servant's means of knowledge not only equal, but superior, to those of the master, defendant in error is forced into the dilemma of maintaining that the danger of such a defect was one which the master was bound to anticipate, while the servant was not. This contention is evidently unsound, as will be recognized upon its simple statement, without more. . . Under such circumstances, if the servant is not bound to anticipate and appreciate the danger, no grounds can be suggested on which the master is required to do so. . . When the defect is known, and the danger apparent, it is immaterial that the servant does not anticipate the precise extent or character of the injury which may result. None of the authorities upon the subject put the rule of assumption of risk upon the narrow distinction that the servant may know of the danger, but not fully realize the extent or character of the injury which may be sustained. The attempt to introduce such a test case or condition would render the rule of assumption of risk by the servant practically nugatory. That there is no such impracticable element in the rule must be regarded as settled."

To the same effect is the case of *Bollington v. Louisville & N. R. Co.*, 125 Ky. 186, 100 S. W. 850, where the complaint was that the servant was directed to mix lime and water, without being instructed or warned of the danger of explosion, which the servant did not know and which the master did know, the court using this language:

"The use of water and lime in making whitewash, and the effect of water on lime when applied to it, are of such general character and so universally accepted, and are of such commonplace and every day transactions, that any person. . . . who had ordinary intelligence and capacity would and ought to know and understand the effect of mixing lime with water, and take notice of this common and universal natural law."

Of like import is *Roessler & H. Chemical Co. v. Peterson*, 134 Fed. 789:

"It cannot be seriously contended that any special duty of protection is owing by the employer to a laborer of

mature years and intelligence, who assumes, upon request, the work of slacking lime for the purpose of whitewashing. The employer in this case, is not to be complained against for assuming that such a man understands, as well as the employer, all that is necessary to be understood about the work he undertakes."

In *San Antonio Gas Co. v. Robertson*, 93 Tex. 503, 56 S. W. 323, the servant lost an eye while spreading heated tar upon a boiler higher than his head, some of the tar splashing into his eye. He had never performed such a labor before, and was ignorant of the danger of such an occurrence. The court says:

"The case does not come within the principle, so often declared, that the master engaged in a dangerous business must not expose an inexperienced servant to the hazards of it, without warning of their existence. . . No authority has been found, and we think no sound one can exist, in which the duty to warn and instruct the servant arises where no unusual or extraordinary danger is to be encountered. . . That a serious injury was inflicted does not prove that the work was more than ordinarily dangerous; for there is scarcely a business or situation in which one may not, without negligence in any quarter, receive a serious injury to so delicate an organ as the eye. Such injuries do not, however, generally happen from ordinary risks; and, hence, where only ordinary risks are to be incurred, they are not to be anticipated and provided against."

See, also, *Illinois Cent. R. Co. v. Young*, 124 Ky. 8, 97 S. W. 1115.

A well-considered case, citing many authorities in its support, is that of *Hysell v. Swift & Co.*, 78 Mo. App. 39, where a boy was set to work brushing off a rail along which the carcasses of the animals were propelled. The dust on the rail contained poisonous bacteria, some of which lodged in the boy's eye and destroyed it. It was contended it was the duty of the master to know the probability of such an injury and to warn the servant against it, or to furnish him protection against its happening. It was not shown that, in all

the clearing of the rail before, any bacteria had found lodgment and worked injury to any one. The court held that the injury could not reasonably have been anticipated, and would not have happened except under exceptional circumstances, and that in such cases it is not necessary to take precautionary measures to prevent an injury, although, if taken, the injury could not have happened; citing Ray, Negligence of Imposed Duties, 133, that: "A reasonable man does not consult his imagination, but can be guided only by a reasonable estimate of probabilities"; and Webb's Pollock on Torts, 45, where that author says:

"A reasonable man can be guided only by a reasonable estimate of probabilities. If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all."

A like rule is laid down in *American Brewing Assn. v. Talbot*, 141 Mo. 674, 42 S. W. 679, 64 Am. St. 538, where it was sought to fix the charge of negligence on the defendant in not anticipating the sinking or settling of a warehouse, caused by an unusual rise in the Mississippi, it being held, where an injury cannot reasonably be anticipated, and would not have happened except under exceptional circumstances, it is not negligence to fail to take precautionary measures to prevent it.

Mr. Justice Peckham recognizes the same rule, in *Hubbell v. Yonkers*, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522, in holding, where the accident is one of that character whose occurrence is rare, unexpected, and unforeseen, to hold it to be negligence in failing to provide against it, is to hold to a most extensive liability, and to cause defendants in cases of this character to become substantially insurers against any accident which human care, skill, or foresight could prevent. Chief Justice Cooley gives his support to the doctrine, in *Sjogren v. Hall*, 53 Mich. 274, 18 N. W. 812,

in saying that where the person injured had the same means as the employer of understanding the danger, or the accident was such as no one would have been likely to foresee, there could be no recovery. In both the last-cited cases many illustrations are given of the effect and prevalence of the doctrine. Other cases directly in point are: *Nelson v. Chicago, M. & St. P. R. Co.*, 30 Minn. 74, 14 N. W. 360; *Lane v. Town of Hancock*, 142 N. Y. 510, 37 N. E. 473; *Beltz v. Yonkers*, 148 N. Y. 67, 42 N. E. 401. So that, as was said in *Hysell v. Swift & Co.*, *supra*, whether judged by the accepted rule requiring the master to provide a reasonably safe place for his servant to work, and reasonably safe tools and appliances with which to work, and guard him; or whether, conceding the proper application of such rule in the great variety of uncommon cases, where it has been held to be the duty of the master to become informed on those matters of scientific knowledge possessed by men of general education and information relative to the danger and hazard of the business in which he is engaged, and that he should give information of such danger to his uninformed servant, and provide him with reasonably safe appliances for his protection; it likewise follows that, when injury is unlikely to follow lack of information, when it cannot reasonably be expected to follow, when the chance of injury on account of lack of information is remote and could not reasonably have been anticipated, and would not happen unless in exceptional circumstances, then a failure to provide against resulting injuries is not negligence.

It, therefore, follows, if our reasoning be correct and the authorities we have cited are sound in principle; that whether the injury in this case was from an apparent danger which was one of the attendant risks of the employment, or whether it was so unusual in its character, so unlikely to happen, so unexpected in ordinary conditions, that the ordinarily prudent man, whether master or servant, could not foresee it, nor anticipate it, and thus guard against it, the re-

sult is the same; negligence cannot be attributed to the respondent.

Believing, therefore, the court below was justified in his ruling, the judgment is affirmed.

MOUNT, CROW, PARKER, and CHADWICK, JJ., concur.

RUDKIN, C. J., FULLERTON, GOSE, and DUNBAR, JJ., dissent.

[No. 8114. Department One. November 5, 1909.]

A. H. JONES, *Appellant*, v. DANIEL JONES *et al.*, *Respondents*.[1]

BROKERS—CONTRACT OF AGENT—RECOVERY OF DEPOSIT—PARTIES LIABLE. Where lots were sold by one of the defendants to G. and resold by G. to the plaintiff, the fact that G.'s agent in effecting the resale was also a selling agent for the first defendant and officed with the other defendant, would not render the defendants liable for the return of plaintiff's earnest money on G.'s failure to consummate the resale to plaintiff; plaintiff's only remedy being against G. and his agent.

MONEY RECEIVED—PLEADING AND PROOF—VARIANCE. Where an agent, occupying an office jointly with defendant, effected a sale and left the state, and defendant found among the agent's papers a certificate of deposit endorsed in blank, in an envelope showing that it was part of the earnest money paid to the agent, the fact that defendant deposited the certificate in bank to his own account, and held it subject to the agent's order, would not render defendant liable to the vendee on a complaint alleging that defendant had made the sale and received the earnest money, defendant having had no connection with the transaction and no business connection with the agent.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 4, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action on contract. Affirmed.

[1]Reported in 104 Pac. 786.

Million & Houser and *George M. Sinclair*, for appellant.

Hermon W. Craven, for respondents.

Morris, J.—On April 17, 1907, W. N. Pinkston, on behalf of the appellant, entered into a contract for the purchase of lots 1, 2, and 3, block 24, of Mt. Baker Park Addition to Seattle. Two hundred dollars was paid in cash, and the balance payable within eighteen months. The contract was executed on behalf of James Green, claiming to be the owner of the lots, by F. L. Fehren, and provided that it was made subject to the owner's acceptance. No subsequent payments were made, and thereafter appellant brought this action, alleging that The Hunter Tract Improvement Company was at all times the owner of the lots mentioned, and that in April, 1907, it entered into a contract with James Green for the sale to him of said lots upon terms not known to the plaintiff; that thereafter F. L. Fehren, then being the agent of the Improvement Company and of Daniel Jones & Company, and acting for them, entered into the first-mentioned contract with Pinkston, and received the $200 for and on behalf of the Improvement Company and Daniel Jones & Company; that appellant, upon examination of an abstract, discovered what he claimed to be an encumbrance upon the title, and demanded its removal, and his demand being refused, he then presented the contract to Green for his approval, but that Green refused to approve same, and he then demanded the return of his $200, which being refused, the action was brought. The record for some reason omits any other pleading, and we are therefore unable to determine what the answers were. We assume, however, that the issues were properly joined between appellant and respondents Daniel Jones & Company and the Hunter Tract Improvement Company. James Green, not being served with summons, did not appear. The cause was tried before the court, a jury being waived.

The court below finds that the Improvement Company, on April 4, 1907, being the owner, entered into a contract for the

sale of the lots to Green, and that Green thereafter duly authorized Fehren, as his agent, to resell the lots at an advanced price; that Fehren, acting under such authority, entered into the contract with Pinkston for the sale to appellant, receiving $200 as part payment; that Fehren was not the agent of the Improvement Company, nor of Jones & Company, and that Green approved of the contract made by Fehren as his agent. Upon these findings it reached the conclusion that appellant had not made a case against either the Improvement Company or Jones & Company, and entered judgment of dismissal, and appellant brings the case here.

The evidence strongly supports the findings of the court, and is susceptible of none other. The only connection between the Improvement Company and Fehren is that Fehren and Jones were agents of the Improvement Company in the sale of property in this addition on behalf of the Improvement Company. The Improvement Company had no part nor interest in the sale by Green to appellant, and the fact that Fehren was its agent for the sale of its lots is not evidence that, in negotiating the sale of the lots by Green to appellant, he was acting other than as agent for Green. There can be no question from the evidence but that he was authorized by Green to sell the lots. Neither had Fehren any connection with Jones & Company other than that they were both authorized by the Improvement Company to sell its property, and maintained offices in the same room. Each acted independently of the other, and maintained his own separate relation with the Improvement Company. The payment of the $200 was not a payment to the Improvement Company, nor to Jones, neither of whom had any connection with the sale to appellant; and there could be no recovery of the $200 except from Fehren or his principal Green. Fehren left Seattle in May, 1907, and some time thereafter Jones found a certificate of deposit in the sum of $150, among some papers belonging to Fehren. The certificate was indorsed in blank by Fehren, and on the envelope in which it was contained was noted:

"A deposit on the sale of the lots from Green to Jones." Jones took the certificate and deposited it in the bank in his own account, and has ever since held the same subject to the order of Fehren. This would not, however, subject him to a liability for the $150, upon the cause of action pleaded, and in so finding the court below was right.

Respondent moves to dismiss the appeal, but having reached an affirmance of the judgment, we do not pass upon the motion to dismiss. The judgment is affirmed.

RUDKIN, C. J., CHADWICK, FULLERTON, and GOSE, JJ., concur.

[No. 8124. Department One. November 5, 1909.]

NELS CHRISTOPHER, *Respondent*, v. LOTTIE FERRIS *et al.*, *Appellants*.[1]

LIENS—ADVANCEMENTS—MISAPPROPRIATION OF FUNDS. Small advancements of money to defendant to be invested in real estate for plaintiff, do not impress a lien on specific real estate previously purchased by the defendants, by reason of plaintiff's use of the money to pay portions of a note secured by mortgage on the property, when the time elapsed and the small amounts preclude the idea that they were furnished to invest in any particular tract.

HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—MORTGAGE BY HUSBAND. Where land was deeded by the husband to the wife, either before or after marriage, it is her separate property, and not subject to mortgage by the husband alone.

VENDOR AND PURCHASER—MORTGAGED PROPERTY—BONA FIDE PURCHASER—PRIORITIES. Purchasers of the separate property of the wife, with knowledge of a void mortgage thereon executed by the husband alone, are not liable for the mortgage, when there was no intent to pay the same; and the fact that they retained $200 of the purchase money to contest the mortgage, is not a recognition of the mortgage, but rather the contrary.

Appeal from a judgment of the superior court for King county, Griffin, J., entered January 11, 1909, upon findings in

[1]Reported in 104 Pac. 818.

favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for equitable relief. Reversed.

O. E. Sauter and *Judd & Olson*, for appellants.

Byers & Byers, for respondent.

Morris, J.—The respondent brought this action to subject certain real property to a lien arising out of three separate causes of action. In the first it was alleged that, during the year 1906, respondent and his brother advanced money to George W. Kuppler, which it was represented was to be invested in lands and title taken in the name of respondent's brother; but that Kuppler used the money in paying for the lot in controversy; that on May 15, 1907, the fraud being discovered, Kuppler gave the Christophers his note for $1,306, secured by a mortgage upon this lot. The title of the lot on May 15, 1907, was in the name of Harriette L. Cherry, having been obtained by her by deed from one Carlson, dated May 15, 1906, in which deed she is described as a spinster. On June 11, 1907, she transferred the title to appellants, and the purpose of this action was to declare a lien in respondent superior and prior to appellants' deed. The other causes of action are not involved in this appeal.

The history of the Kupplers, so far as it affects the title to this lot, is that on March 5, 1906, they were married at Vancouver, B. C. On May 15, 1906, the deed above referred to conveyed the lot in controversy to Harriette L. Cherry, describing her as a spinster. On May 26, 1906, George W. Kuppler conveyed the same lot to Harriette L. Cherry by quitclaim deed. On July 12, 1906, a second marriage ceremony was performed between them at Tacoma. There is some suggestion in the record that Harriette L. Cherry, at the time of the Vancouver, B. C. marriage, had been divorced less than six months, and we infer, neither of them testifying in the cause, that the second marriage was entered into under the impression that the first was invalid, and that there was

no legal relation between them until the Tacoma marriage, which may account for the fact that, in the two deeds of date prior to the last marriage ceremony, the grantee is named as Harriette L. Cherry. We cannot find any evidence that the money George W. Kuppler obtained from the Christophers was part of the purchase money of the lot in question. The deed conveying the title to Harriette L. Cherry is dated May 15, 1906, and recorded May 26, 1906. It recites a consideration of $4,000, and that the lot is subject to a mortgage of $1,000. The Christophers did not begin to furnish Kuppler money until July 24, 1906, and between that date and April 20, 1907, when he was given a check for $456, the remainder was furnished in sums of from $35 to $106. The time elapsing between these dates, and the small amounts paid, preclude the idea that they were furnished to invest in any one lot or parcel of land, and we know of no law or principle of equity under which a lien could be impressed upon this lot for the aggregate of the sums furnished.

The nearest the evidence comes to showing any connection with this lot and the money of the Christophers, is found in the testimony of respondent. He says: "He [Kuppler] told me that money of mine went on a note that they owed that was on the house, that he never got the money out of the bank, the bank held it, and that money went on a note that they owed that was against the house;" meaning, we take it, that Kuppler had borrowed money from some bank to make a payment on the property, and when the note became due they borrowed money from the Christophers to take it up. Assuming this to be the fact, we know of no lien thereby impressed upon the property. If Harriette L. Cherry was not the wife of George W. Kuppler on May 15, 1906, then the deed to her invested her with the title to the property. If she was the wife of George W. Kuppler by reason of the marriage at Vancouver, B. C., on March 5, 1906, then the quit-

claim deed from George W. Kuppler to her, dated May 26, 1906, invested her with his community interest, and she then became the owner in her separate right. So, whether she was or was not the wife of George W. Kuppler from and after May 26, 1906, the property was her separate property, and the deed from her to appellants invested them with full title.

It is urged that appellants purchased with full knowledge of the respondent's mortgage. That is true, but such knowledge could not add anything to the character of the lien represented by such mortgage. It is likewise true that respondent took his mortgage with knowledge of the title in appellants' grantor, so that the equities are equal. Inasmuch as George W. Kuppler had no interest in the property on May 26, 1906, his mortgage to the respondent on that day could not create any lien or incumbrance upon the property. It is next urged that the value of the property was $7,500; that appellants purchased for $6,200, and it must have been that the remaining $1,300 was intended to cover the mortgage of respondent. It is true that witnesses for respondent testify the property was worth $7,500, while appellants testify that full value was paid for the property, and we cannot find from the evidence that appellants made their purchase with any intention of paying respondent's mortgage.

Neither does the fact that appellants retained $200 for the purpose of contesting respondent's mortgage prove that they thereby subjected themselves to its lien. Such fact rather would prove that they did not recognize the lien of the mortgage. But inasmuch as it had been given by George W. Kuppler, it was incumbent upon the Kupplers to pay the cost of removing it as a cloud upon the title, or defending any action that might be brought for its foreclosure.

We are therefore of the opinion that the court below was in error in entering its decree adjudging the sum of $1,306, with interest and attorney's fee, to be a specific lien upon the lot in controversy, and decreeing a foreclosure and sale, and

to that extent the judgment appealed from is reversed, and the cause remanded with instructions to enter a decree in accordance with the views herein expressed.

RUDKIN, C. J., CHADWICK, and GOSE, JJ., concur.

FULLERTON, J., concurs in the result.

[No. 8180. Department One. November 5, 1909.]

FAIRBANKS-MORSE COMPANY, *Appellant*, v. UNION BANK & TRUST COMPANY, *Respondent*.[1]

MARITIME LIENS—MATERIALS FURNISHED UNDER CONDITIONAL SALE—STATUTES—CONSTRUCTION. The lien upon vessels for material furnished in their construction or repair in this state, given for three years by Bal. Code, § 5953, is not affected by the fact that a conditional bill of sale was given for marine engines furnished for a ship, the title to the engine being retained by the vendor as security, and that the bill of sale was not filed pursuant to Laws 1903, p. 6, providing that a conditional bill of sale not filed within ten days shall be absolute as to subsequent incumbrancers in good faith; since the lien given by Bal. Code, § 5953, attaches whether the sale was absolute or conditional.

SAME—CONDITIONAL SALES AS WAIVER OF LIEN. The vendor of a marine engine furnished for a ship does not waive a lien given upon the ship, her tackle, apparel, etc., by reserving a specific lien upon the engine by means of a conditional bill of sale, since retention of title is not inconsistent with the lien and does not waive statutory liens.

SAME—WAIVER OF LIEN—ADDITIONAL SECURITY. The rule that retention of additional security waives statutory liens does not apply to maritime liens under Bal. Code, § 5953, because the rule is founded upon the theory that subsequent creditors rely upon the records, and under this statute no record notice of the lien is provided for.

SAME—MARITIME LIEN WITHOUT NOTICE—POSSESSION OF ARTICLE. The lien given by Bal. Code, § 5953 upon a vessel, her tackle, apparel, etc., for three years, without the filing of any notice, is not merely declaratory of the common law and dependent upon retaining possession, since the statute contemplates delivery of possession to the owner of the ship and gives a lien upon articles never in the possession of the claimant.

[1]Reported in 104 Pac. 815.

SAME—TIME FOR ENFORCEMENT—NOTICE—LACHES. The lien upon a vessel given by Bal. Code, § 5953, for materials furnished is not lost by laches in failing to give notice or to assert the lien when action is taken within the three years allowed by the statute.

GOSE and FULLERTON, JJ., dissent.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered May 15, 1909, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action to establish a lien under a conditional sale contract. Reversed.

Cake & Cake and *Conway & Snider*, for appellant.

John C. Hogan and *E. J. Adams*, for respondent.

MORRIS, J.—On December 18, 1906, appellant sold to defendant Bernard a marine engine, as part of the equipment of the tug "Florence B.," for the sum of $2,150. Such sale was manifested by a written agreement under which appellant retained the title to the engine until the payments provided for in the agreement were fully made. This agreement, being in effect a conditional sale contract, was not recorded until the 18th day of July, 1908. On October 24, 1907, Bernard gave a mortgage upon the Florence B., including her machinery and engine, to the respondent, as security for a loan of $7,000. The mortgage was also conditioned as security for future advances, which were made until the debt aggregated the sum of $22,000. On December 4, 1908, the respondent commenced foreclosure proceedings upon this mortgage, resulting in a decree of foreclosure in its favor. The sheriff took possession of the tug under an order of sale based upon the foreclosure decree, and was about to sell, when the appellant commenced this action, claiming a lien upon the tug in the sum of $1,100.69, being the balance claimed to be due upon the original purchase price of the engine, and praying that its lien be established as prior to respondent's mortgage. Upon the trial the court

below established the lien, but held it to be subsequent and inferior to respondent's mortgage, and upon so entering its decree, the case is brought here on appeal.

There is no dispute as to the facts, the only question involved being, Has appellant a valid and subsisting lien, and is it prior or subsequent to respondent's mortgage? At the time of the execution of respondent's mortgage, it had no knowledge that the engine was not paid for, nor had it notice of the execution or existence of the conditional sale contract under which the engine was delivered to Bernard, and appellant admits that respondent was an incumbrancer in good faith. It is also admitted that, at the time of the making of the loans by respondent and the execution of its mortgage, Bernard was in full and sole possession of the tug Florence B. Bal. Code, § 5953 (amended by Pierce's Code, §6077), provides that,

"All steamers, vessels, and boats, their tackle, apparel, and furniture, are liable, . . . For work done or material furnished in this state, for their construction, repair, or equipment, at the request of their respective owners, . . . Demands for these several causes constitute liens . . . and have preference over all other demands; but such liens only continue in force for a period of three years from the time the cause of action accrued."

There is no provision made in the statute for any filing or record of such lien, nor is there any special provision made for its foreclosure. It is the contention of appellant that, under this statute, its lien was created by, and existed from and after, the sale of the engine and its installation as part of the equipment of the Florence B., and that, three years not having elapsed from said time, said lien was in full force and effect at the time of the execution of respondent's mortgage, and is superior thereto; while respondent contends that the execution of the conditional sale contract operated as a waiver of the lien, and that, such contract not being filed for record within ten days, the sale became absolute, under the provisions of Bal. Code, §4585 (P. C. §6547), as

amended by Laws 1908, p. 6, to the effect that all conditional sales of personal property, where the property is placed in the possession of the vendee, shall be absolute as to incumbrancers and subsequent creditors in good faith, unless a memorandum of such sale be filed within ten days after the vendee takes possession; repondent's argument being that, such sale having become absolute for failure to record any memorandum thereof within ten days, any lien which might have existed prior thereto is destroyed; that the statutory expression "absolute" excludes the existence of any lien.

We cannot agree with this contention. If the sale became "absolute," it could only mean that, because of appellant's failure to record the memorandum within ten days, it could not retain the title to the engine as security for the deferred payments, and that such title passed to Bernard, and became "absolute" in him as to his subsequent creditors in good faith. The lien upon the vessel provided for in Bal. Code, § 5953 (P. C. § 6077), applies to all furnishing of material for the equipment of vessels, including materials furnished under an "absolute" sale. So that, if such sale became "absolute" as to respondent as a subsequent incumbrancer, in good faith, it still retained all its liability and subjection to appellant's lien. The only effect of the conditional sale statute and appellant's failure to comply therewith was that as to respondent it could no longer retain within itself the title to the engine, and that such title vested in Bernard and became subject to the lien of respondent's mortgage. Such lien so created would thereupon take its order among other liens properly created either by law or the act of parties. There is no provision in the conditional sale statute which attempts to destroy the effect of any valid existing lien. It simply gives to subsequent incumbrancers in good faith and without notice a right to hold the property as a lien or security for their debt, which otherwise they would not have had. If, as between appellant and respondent, the sale at the time of the execution of respondent's mortgage had become abso-

lute, appellant could not and did not lose any right which by virtue of the lien statute vested in it upon an absolute sale of property, and its lien was still valid and in full force and effect.

Respondent suggests that appellant, having reserved the title in itself under the conditional sale contract, it thereby waived its lien. The retention of title in itself under the conditional sale contract, until full payment had been made, was not inconsistent with the lien given appellant by statute. The conditional sale contract gave it a specific lien upon the identical property furnished, the statute gave it a general lien upon the vessel, its tackle, apparel, and furniture. It had an undoubted right to secure the payment of its debt in any manner recognized in the law, whether such security was written in the contract of sale or attached by virtue of the statute. It is not the law that, by taking advantage of one form of security, a party thereby waives or loses any other form which in law attaches to the contract. Appellant could look to Bernard personally for the payment of its debt, and to any and all other remedies conferred by law to enforce payment of the debt. *Case Mfg. Co. v. Smith*, 40 Fed. 339.

It is the undoubted rule of law that reservation of title to property in the vendor, until full payment of purchase price, does not defeat or waive any specific lien created by statute. *Hooven O. & R. Co. v. Featherstone's Sons*, 111 Fed. 81; *Chicago & A. R. Co. v. Union Rolling-Mill Co.*, 109 U. S. 702, 3 Sup. Ct. 594, 27 L. Ed. 1081; *Clark v. Moore*, 64 Ill. 273; *Anthony v. Smith*, 28 Tenn. 508; *Fogg v. Rogers*, 42 Tenn. 290; *Kilpatrick v. Kansas City etc. R. Co.*, 38 Neb. 620, 57 N. W. 664, 41 Am. St. 741; *Peninsular General Elec. Co. v. Norris*, 100 Mich. 496, 59 N. W. 151. Wherever it has been held that additional security waives statutory liens, such ruling is founded upon the theory that subsequent creditors may place full reliance upon the records as determining the condition of the property. *Chapman v. Brewer*, 43 Neb. 890, 62 N. W. 320, 47 Am. St. 771. Such a rule

cannot prevail here as applied to this character of lien, because the lien is a secret one, attaching upon the furnishing of the material. No act is required on the part of the claimant to secure his lien. He is neither required to record it, to give notice, nor do any act to make his lien operative.

Respondent urges that the statute is merely declaratory of the common law and, following the general rule in common law liens, the lien is lost by delivery of possession. The statute determines otherwise. It does not contemplate retention of possession; it gives a lien upon that which the vendor never had in his possession. The vendor may, as in this case, furnish material for the equipment of the boat, and his lien is extended, not only to the material furnished, but the entire vessel, its tackle, apparel, and furniture is subject thereto. There is no connection nor relation whatever between the attachment of the lien and possession. From the reading of the statute it is plain that it contemplates possession remaining in the ownership of the vessel, from the fact that it gives liens to those who never have been in possession of the vessel or any part of its equipment.

Again, it is asserted that appellant should lose its lien because of its laches in not giving notice of its claim of lien, until the record thereof in July, 1908, eighteen months after the sale. The statute itself answers the contention. It gave appellant three years in which to assert its lien, and there could be neither laches nor estoppel while appellant was within the time granted him by the statute.

We therefore hold the court below was in error in holding appellant's lien inferior to respondent's mortgage. The judgment is reversed in so far as it establishes priorities of these liens, and the cause is remanded to the lower court with instructions to enter a decree establishing appellant's lien as prior and superior to respondent's mortgage. Appellant will recover its costs herein.

RUDKIN, C. J., and CHADWICK, J., concur.

Gose, J. (dissenting)—I think that our code, Bal. Code, § 5953, giving a lien for material furnished for steamers, vessels, and boats, contemplates a completed sale. The code, Bal. Code, § 4585 (P. C. § 6547), as amended by laws of 1903, p. 6, provides for the execution and filing of contracts "containing a conditional right to purchase." Pursuant to the later statute, the appellant's contract stipulated that: "It is agreed that Fairbanks-Morse Company does not relinquish its title to said property and that the title to said property shall remain in Fairbanks-Morse Company until fully paid for." I do not think the case presents the question of waiver or of inconsistent liens, but that the point to be determined is whether the first statute referred to gives one a lien upon his own property. The failure of the vendor to file the contract for record within ten days made the sale absolute as to purchasers, incumbrancers and subsequent creditors in good faith, but did not change its nature between the vendor and the vendee. The contract was made in 1906 and was filed for record on the 18th day of July, 1908, and after the execution of the mortgage. The actual legal title to the property remained in the appellant until it commenced its action for a recovery of the purchase price and the foreclosure of the alleged statutory lien. By its own act it could not convert a legal title into a retroactive sale, and thus invoke the protection of the statute. In most of the cases relied upon in the majority opinion, the title had been expressly reserved as security, whereas, in the instant case, it was reserved absolutely until the property was paid for. They are therefore distinguishable.

In *Peninsular General Elec. Co. v. Norris*, 100 Mich. 496, 59 N. W. 151, the title seems to have been reserved, and the case supports the majority opinion. However, I do not think it correctly expounds the statute, and the question being *res nova* in this court, I feel constrained to dissent from the view expressed by the majority.

Fullerton, J., concurs with Gose, J.

[No. 7759. *En Banc.* November 5, 1909.]

SPOKANE GRAIN COMPANY, *Respondent*, v. GREAT NORTHERN EXPRESS COMPANY, *Appellant*.[1]

PLEADING—VARIANCE—FAILURE OF PROOF—AMENDMENTS. A verdict for plaintiff, in an action for the conversion of horses shipped by defendants' road, cannot be sustained upon evidence of a breach of defendants' contract of carriage, as against a motion for nonsuit or judgment *non obstante veredicto;* as amendments to conform to proof do not permit allegation of one cause and proof of an entirely different cause.

CARRIERS—OF LIVE STOCK—CONVERSION—BREACH OF CONTRACT—EVIDENCE—SUFFICIENCY. A carrier, removing from a car horses that had been burned and were suffering intensely, for the purpose of treatment and as an act of humanity, is not guilty of a conversion, although the removal was objected to by the shipper and there was conflict in the evidence as to whether they could have stood the balance of the trip.

TRIAL—DIRECTED VERDICT—PROVINCE OF COURT AND JURY. A verdict of dismissal *non obstante veredicto* may be granted where, under the facts, no possible recovery could be had.

CARRIERS—OF LIVE STOCK—CONVERSION—BREACH OF CONTRACT—VARIANCE. A verdict for plaintiff, in an action for conversion of horses, taken by defendant, a carrier, from the car during transportation, for the purpose of treatment for burns caused by a fire in the car, cannot be sustained on the theory of breach of the contract of carriage and negligence of the defendant in setting the fire, where the complaint was based solely upon the ground of conversion, the jury were instructed that it was immaterial whether the fire was negligently set by the plaintiff or defendant, and the evidence of negligence was admitted only upon the defendants' counterclaim for charges in treating and caring for the horses.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 30, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for conversion. Reversed.

[1]Reported in 104 Pac. 794.

L. C. Gilman, B. O. Graham, and *F. G. Dorety*, for appellant.

Chas. D. Fullen, for respondent.

MOUNT, J.—This action was commenced by the Spokane Grain Company, a corporation, against the Great Northern Railway Company, a corporation, to recover the value of two horses delivered to the defendant for shipment from St. Paul, Minnesota, to the plaintiff at Seattle, Washington. The plaintiff alleged that it had delivered fourteen horses to the defendant at St. Paul for transportation to Seattle, and while they were in defendant's possession, in a car furnished by it and en route to Seattle, the defendant, on June 11, 1907, at Spokane, Washington, wrongfully, illegally, wilfully, and against plaintiff's protest, removed two of the horses from the car; that it converted them to its own use, and failed to deliver them at Seattle as it had contracted to do. The defendant by its answer denied the alleged wrongful taking, and set up that the horses, when removed from the car at Spokane, had been severely burned about their forelegs, neck, and head by a fire in the car, which occurred during their transportation, and which resulted from the negligence of an attendant without any fault of the defendant; that the attendant was an employee of the plaintiff, and further alleged:

"That when said car containing said horses arrived at the city of Spokane, the two horses which were burned as aforesaid were suffering intense pain by reason of said burns, and on account of the painful manner, posture, and confinement rendered necessary by their transportation in said car; and said two horses could not have been transported from Spokane, Washington, to Seattle, Washington, without cruelly torturing said animals, or without transporting said animals in said car in a cruel and unnecessarily painful manner, posture, or confinement. . . . That defendant thereupon, for the purpose of giving such horses proper care and attention and proper medical and surgical attendance, and to avoid torturing or inflicting unnecessary suffering or pain

upon said horses, and to avoid transporting said horses in a cruel or unnecessarily painful manner, posture or confinement, removed said two horses from said car, and placed same in a suitable barn, and, exercising due care and prudence, procured a duly licensed and practicing veterinary surgeon to attend said animals. That plaintiff abandoned said animals at said time, and refused to provide necessary medical or surgical attention therefor, or to provide any care or attendance of any kind to relieve the suffering of said animals, or to cure the injuries inflicted by such fire."

The answer also alleged a counterclaim for expenses incurred in caring for the horses while in defendant's custody, and for carriage from St. Paul to Spokane. The plaintiff's reply, after admitting that the horses were burned, denied that their removal was necessary, or that plaintiff's negligence caused the fire, and alleged:

"That said horses were injured by reason of the failure of the defendant to properly equip and protect the car containing said horses from danger of fire which might be caused from the engine attached to the train of which said car was a part, in that a ventilator to said car immediately over the heads of the said horses was not protected with a proper screen and thereby the sparks from the engine attached to said train were caught and thrown in and upon the hay and feed necessarily carried in said car for said animals and thereby a fire occurred somewhat injuring said horses. That the defendant recognized its liability for the injury to said horses and did, against the protest and wishes of the plaintiff, make and convert the said horses to its own use at the city of Spokane aforesaid, and did wholly fail to transport and deliver to the plaintiff at the city of Seattle the said horses as the said defendant was under and by virtue of said contract and under and by virtue of its duties as a common carrier bound to do, as stated and set forth in the plaintiff's complaint. That the defendant elected to take said horses from said car and remove the same from the care and protection of the plaintiff and did assume against the wishes and protest of the plaintiff to appropriate said horses to the defendant's own use, and by so doing refused to transport said horses to the said city of Seattle and deliver the same to the plaintiff as said defendant was required to do."

At the close of the plaintiff's evidence, the defendant moved the court for a directed verdict, and at the close of all the evidence, requested the court to instruct the jury to return a verdict for the defendant. Both of these requests were denied. A verdict was returned in favor of the plaintiff for $360. Thereupon the defendant, without asking a new trial, interposed a motion for judgment *non obstante veredicto*, which was denied. From the final judgment entered on the verdict, this appeal is prosecuted.

We are of the opinion that the court should have directed a verdict at the close of the evidence, and should have sustained the motion for judgment of dismissal *non obstante veredicto*. It is plain, by both the pleadings and the evidence, that the basis of the action was the alleged unlawful conversion of the horses by the defendant. Plaintiff did not seek, either by its pleading or proof, to recover by reason of the negligence of the defendant or on account of a breach of contract of carriage. It relied wholly upon the alleged unlawful conversion of the horses by the defendant, and the case was tried upon that theory, and was by the court submitted to the jury upon that theory. It must be assumed, therefore, that the jury found as a fact that the defendant did unlawfully convert the horses to its own use, and for that reason rendered its verdict for the plaintiff.

We are mindful of the fact that, where a motion for a directed verdict or a verdict *non obstante* is made, we must to a certain extent examine the evidence to determine whether the plaintiff may recover upon the facts shown. But if there is substantial conflict in the evidence, we may not disturb the finding of the jury and will, if necessary, treat the pleadings amended to conform to the facts proved. This rule, however, must not be held to permit a plaintiff to allege one cause of action and prove an entirely different cause, wholly foreign to the one alleged. The defendant is entitled to know, and the complaint must inform him of, the character of the action the plaintiff bases his claim upon.

The evidence in this case is conclusive that there was no wrongful or unlawful conversion of the horses by the appellant. There is substantially no dispute upon this question. It is admitted that the horses, while being shipped in a car from St. Paul to Seattle, were badly burned by a fire which started in some hay in the car; that when the car arrived at Spokane the horses were suffering intense pain; their heads were swollen to twice their natural size, and their breathing was very difficult, so that the attendant in charge attempted to relieve one of the horses by inserting in its nostril a piece of rubber hose. Under these circumstances the officers of the appellant company believed it would be inhuman to permit the horses to continue the journey to Seattle. Because of that belief, the horses were taken from the car and detained at Spokane for treatment for their injuries, and for no other purpose. The respondent was informed and knew of the purpose for which the horses were detained. It is true that the officer or agent of the respondent in care of the horses objected to the appellant stopping them at Spokane, and there is disputed evidence to the effect that the horses could have been carried on to their destination without greater suffering than they endured. But this does not show, or even tend to show, that the stoppage of the horses in transit was either wrongful or unlawful. The removal of the horses from the car was simply an act of humanity to relieve their suffering. If the horses had been killed by the fire, and the appellant had removed the remains from the car at the time and place the injured horses were removed, certainly no action for wrongful or unlawful conversion could have been maintained thereon. For the same reason there was no such conversion in this case. The removal of the horses from the car, under the circumstances admitted in this case, was clearly a rightful act, done simply for the purpose of relieving the suffering animals, and not for the purpose of converting them to the use of the appellant.

Nor was there any such conversion. One of the horses

died from the effect of its injuries within a few days after it was removed from the car. The other was finally cured, and was shipped to its destination and offered to respondent, who refused to receive the animal. There is no evidence in the case, except the mere fact that the respondent objected to the removal of the horses from the car, indicating that there was any unlawful conversion of the horses by the appellant. This is clearly insufficient to show such conversion.

"Where there is no unlawful taking or exercise of dominion over a chattel, a conversion cannot be based on the fact that the defendant was negligent in regard to the care of the chattel, resulting in its destruction, nor can a conversion be based on the mere failure of the defendant to perform with regard to a chattel some affirmative act which he has by contract assumed; the remedy in such a case is an action on the case for negligence or an action for breach of contract." 28 Am. & Eng. Ency. Law (2d ed.), 682.

It is the rule that, if any possible recovery may be had under the facts, then no judgment *non obstante veredicto* may be granted. This rule was stated in *Roe v. Standard Furniture Co.*, 41 Wash. 546, 83 Pac. 1109.

But it cannot be claimed that there was sufficient evidence in this case to show that the fire which injured the horses was caused by the negligence of the appellant, and therefore that the verdict may be allowed to stand. Evidence was introduced upon that question, but it was introduced solely upon the counterclaim of the appellant and limited by the court to that purpose. In his instructions to the jury the court said:

"You are instructed that in determining whether or not the defendant wrongfully removed said animals from said car or appropriated them to its own use, it is immaterial whether said fire was caused by reason of the negligence of the plaintiff or by reason of the negligence of the defendant, for the reason that the plaintiff bases its action against the defendant upon its claim that the defendant wrongfully removed said animals from said car and appropriated them to its own use. The question as to whether the fire originated by reason of the negligence of the plaintiff or by reason of the negli-

gence of the defendant is material only when the question of whether the defendant is entitled to recover from the plaintiff in this action on its counterclaim the charges for transportation of the animal which died at Spokane, from St. Paul to Spokane, and if the injuries which resulted in the death of said animal were caused by a fire which originated through the negligence of the plaintiff the defendant would be entitled to recover from the plaintiff the regular tariff rate for transportation of such animal from St. Paul to Spokane unless you should find from the evidence that the defendant wrongfully removed said animal from the car at Spokane."

It is plainly apparent, therefore, that the verdict of the jury was not based upon the question of negligence, but was based solely upon the alleged unlawful conversion, which was the theory upon which the action was brought and upon which it was tried. The respondent in its complaint avoided the question of negligence, and purposely refrained from bringing an action for breach of contract of carriage. This fact and the reason therefor is frankly stated in its brief as follows:

"The respondent might have brought a suit for damages to the two horses by reason of appellant's negligence in not having a proper ventilator and for allowing on its car such a ventilator as would permit sparks to enter the car. If respondent had brought such a suit it would have been met with the defense that the respondent could not recover more than $75 for each horse by reason of the limited liability rate."

It cannot, therefore, be claimed in this case that a recovery may be based upon the question of negligence, or upon any other question than the unlawful and wrongful conversion of the property, without asserting the rule that an action may be brought upon one theory, and trial and recovery had upon an entirely different and inconsistent theory.

In view of the fact that there was no substantial evidence of unlawful conversion of the horses by the appellant, the court should have granted the motion for a dismissal of the case. The judgment must, therefore, be reversed, and the

cause ordered dismissed without prejudice to the respondent's right, if any exists, to bring a proper action.

RUDKIN, C. J., PARKER, CHADWICK, MORRIS, DUNBAR, FULLERTON, and GOSE, JJ., concur.

[No. 8076. Department Two. November 5, 1909.]

NICK VIANELLO, *Respondent*, v. WASHINGTON IRON WORKS COMPANY, *Appellant*.[1]

MASTER AND SERVANT—SAFE PLACE—DUTY TO WARN—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY. There is no evidence of negligence warranting a recovery for failure to furnish a safe place to work or in requiring dangerous work without instructions, where it appears that plaintiff, employed for six months in a foundry, was injured while helping twenty to thirty men push a heavy car loaded with flasks into the oven, in the same manner as was done every day, that the car was properly loaded, the place light and free from any danger except the obvious one of placing hands in open places between the moulds, that there was sufficient hand holds without using the place of danger, and that the men were repeatedly warned not to place their hands in the open spaces in pushing, because of danger to the hands and injury to the moulds, although no particular warning was given on that occasion, and the plaintiff testified that he was unacquainted with the English language and did not appreciate the dangers.

SAME — CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In such a case, the employee is guilty of contributory negligence precluding any recovery, as a matter of law, where he placed his hands in an open space between the moulds, which was apparently exceedingly dangerous.

Appeal from a judgment of the superior court for King county, Gay, J., entered February 8, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a foundry. Reversed.

[1]Reported in 104 Pac. 784.

Robert C. Saunders and *E. C. Ellis*, for appellant.

Heber McHugh and *T. J. Casey* (*John T. Casey*, of counsel), for respondent.

Crow, J.—Action by Nick Vianello against Washington Iron Works Company, a corporation, to recover damages for personal injuries. From a judgment in his favor, the defendant appeals.

Numerous assignments of error are presented, but we will only consider those predicated upon the denial of appellant's motions for a directed verdict, and for judgment *non obstante veredicto*. In support of these motions the appellant, in addition to other contentions, insists (1) that no negligence on its part has been shown, and (2) that the respondent was guilty of contributory negligence. The appellant operates a foundry in the city of Seattle, employing a large number of men. In its moulding room is a core oven used for baking and hardening sand moulds. The moulds are made in iron flasks, varying in diameter from two and one-half to five feet. These flasks when ready for the oven are loaded on an iron car. The lower flask is called the drag, the next the cheek, and the one above the cope. They weigh from one thousand to fifteen hundred pounds each. To keep them apart iron dogs are inserted at equal distances on top of and around the circumference of the drag upon which the cheek rests, and in the same manner the cope is separated from the cheek. This is done to permit the circulation of hot air while they are in the oven. The car was propelled by hand, moving on an iron track which extended into the oven. When the car was loaded the employees of the foundry were indiscriminately called upon by the foreman to aid in pushing it into the oven. From twenty to thirty would respond and gather around the car wherever they could obtain hand holds. Around, outside of, and constructed as parts of, the flasks, were ribs and flanges sufficiently wide to be utilized for hand holds.

The respondent had been an employee in the foundry a little over six months. He worked four months as a helper or common laborer and about two months making facings. In his third amended complaint he alleged, that he was unable to speak or write the English language; that he was inexperienced in the work of pushing the car, and did not appreciate its dangers; that appellant ordered him to assist in moving the car; that the work had to be done hastily; that he hurried from his usual place of work near a well-lighted window to a comparatively dark place where the car was loaded; that he was unable to see clearly; that he was directed by the foreman to stand and push at a point designated by him; that the men were crowded around the car; that the car was defective, warped, and twisted with great heat and usage; that it ran with vibrations and bounds against the rail and on its bearings, causing frequent jerking, jolting, and sudden stopping, without notice or warning; that the appellant had negligently loaded it to an unsafe width and height; that it did not properly or safely clamp the flasks together as could have been done; that the defective condition and loading of the car, which were known to the appellant but unknown to the respondent, rendered the place unsafe and dangerous; that appellant negligently failed to warn respondent thereof; that appellant permitted obstructions to be placed upon the track in front of the car, which respondent was unable to see, and that by reason of the carelessness and negligence of appellant and the unsteady condition of the load, and while the car was moving, one of the upper flasks tilted backward and crushed a portion of respondent's left hand which he had inserted between two of the flasks. The appellant pleaded the defenses of contributory negligence, negligence of a fellow servant, and assumption of risk.

No competent evidence was produced to show that the car, the track, or any of the appliances were defective, dangerous, or out of repair. The undisputed evidence did show that the

car was loaded in exactly the same manner in which it had been loaded daily for a period of twelve years, and that it had been pushed into the oven by the men in the same manner all of that time. The respondent on the trial, and also on this appeal, seems to have abandoned any claim of negligence on the part of the appellant, except as pointed out in his answer brief, in the following language:

"Point 1. The appellant was guilty of negligence in furnishing respondent an unsafe place to work in, knowing it to be unsafe, when a safe place was easily available.

"Point 2. The appellant was guilty of negligence in taking respondent from his usual work and directing him to work in a more dangerous place, and by pointing to and commanding him to put his hands in a certain dangerous place, knowing it to be dangerous, without any warning to respondent, appellant knowing that respondent was ignorant of the said dangers and risk, and unable because of existing conditions to observe and know the same."

We fail to find evidence in the record sufficient to sustain either of these contentions, to show any negligence on the part of the appellant, or to support the verdict of the jury. While it is true that the respondent testified that he was ordered by the foreman to push the car, that he was unacquainted with the English language, and that he did not appreciate the dangers attendant upon the work, he also testified that he had been employed in the foundry for more than six months; that he had on three or four previous occasions pushed on the car, and that his ordinary work was only about seventy to one hundred feet away.

The undisputed evidence shows that the car was properly loaded; that the heavy drag, cheek, and cope were always separated by the iron dogs; that they were never clamped; that the car was always pushed by the employees indiscriminately, who were repeatedly warned not to place their hands in the open spaces between the moulds, for the reasons (1) that such openings were the only places at all dangerous, and (2) that the employees by placing their hands therein

were liable to disturb the moist sand, destroy the moulds, and necessitate the work of making them over again; that there were sufficient handholds without placing hands in any of the openings, and that there were not only large windows in the foundry to afford sufficient light, but also electric lights which were used when necessary. The respondent had been working for six months in the same room. The men were indiscriminately called each day to move the car. It is difficult to understand how the respondent could fail to see these large moulds, to observe the manner in which they were placed upon the car, and appreciate that the only danger to which he would be subjected in doing the work would result from inserting his hand between the flasks. If he was a person of sufficient intelligence to retain employment for more than six months in a foundry where machinery was used, where it must have been necessary for him to constantly observe the danger with which he was surrounded, and to do so for his own protection, it is difficult to understand how he could fail to appreciate the only and apparent danger to which he would be subjected when pushing the car.

The only possible theory upon which the appellant could be held guilty of negligence would be by reason of its alleged failure to warn or instruct the respondent as to the danger of the work. The undisputed evidence is that the foreman did repeatedly and daily warn the men to keep their hands out of the openings, not only to avoid danger, but also to prevent injury to them, although there is no positive evidence that he gave such warning on this particular occasion. While it is the duty of the master to warn his employees of dangers with which they are surrounded, especially when they are ignorant thereof and such ignorance is known to the master, it would be difficult to assume that an employee who had been engaged as the respondent had been for the period of six months, did not have ample opportunity for observing all apparent dangers with which he was surrounded, or that he did not observe the same, and that the master should warn

him. The mere fact that he could not speak the English language constitutes no excuse for his ignorance. It cannot be assumed that the only persons of intelligence are those who speak the English language. There is nothing to show that the respondent was lacking in common understanding or ordinary intelligence. Giving due consideration to undisputed evidence showing the employment of the respondent, his surroundings and situation, and the manner in which the work had been done for many years, we conclude that sufficient evidence was not produced to show negligence upon the part of the appellant.

The respondent was guilty of contributory negligence. Although he stated that the foreman took him by the shoulder and directed him to assist in propelling the car, pointing to a place where he should push, he does not testify that the foreman directed him to place his hands between the moulds. Nor is there any evidence that the foreman did so. It must have been apparent to any person of ordinary intelligence that the act of placing his hands between the moulds would be exceedingly dangerous, and we cannot understand how the respondent could have voluntarily done so without being guilty of such contributory negligence as to avoid any recovery by him in this action.

The judgment is reversed, and the cause remanded with instructions to dismiss the action.

Rudkin, C. J., Mount, and Parker, JJ., concur.

[No. 8136. Department Two. November 5, 1909.]

LOA HELMER *et al.*, *Respondents*, v. TITLE GUARANTY & SURETY COMPANY of Scranton, Pennsylvania, *Appellant*.[1]

INSURANCE—INDEMNITY—ACTIONS—CONTRACT—LIMITATION—PLEADING. A limitation in an indemnity bond barring action in case suit is not commenced within four months is waived if not specifically pleaded.

APPEAL—DECISION ON FORMER APPEAL—EXECUTION OF BOND—PLEADING. It cannot be objected that there was no proof of the execution of the bond in suit, where on a former appeal the supreme court held that affirmative defenses substantially admitted the execution of the bond.

TRIAL—EVIDENCE—WAIVER OF OBJECTIONS—EXECUTION OF BOND. The admission in evidence of the bond, in suit "by consent of both parties," waives proof of execution of the bond.

INSURANCE—INDEMNITY—BREACH OF CONDITION—PAYMENT—BURDEN OF PROOF. Where breach of an indemnity bond guaranteeing a building contract is shown by proof of satisfaction of a judgment recovered against the property through default of the contractor, it is not necessary to show failure to indemnify the plaintiff, but the burden of proving payment or performance is on the defendant.

Appeal from a judgment of the superior court for King county, Yakey, J., entered February 11, 1909, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on an indemnity bond. Affirmed.

Carroll & Carroll and *Milo A. Root*, for appellant.

John H. Perry, for respondents.

RUDKIN, C. J.—This was an action to recover damages for breach of the conditions of a surety or indemnity bond. The case was before this court on a former appeal, where a more complete statement of the issues will be found. *Helmer v. Title Guaranty & Surety Co.*, 50 Wash. 411, 97 Pac. 451.

[1]Reported in 104 Pac. 783.

The plaintiffs had judgment below on a retrial of the case, and the defendant has appealed therefrom.

The bond in suit, among other things, provides that no suit, action, or proceeding thereon should be instituted later than four months after the completion of the contract covered by the bond, and the appellant contends that the contract covered by the bond was completed more than four months before the commencement of the present action, and that the action is therefore barred. The respondents, on the other hand, contend that the contract limitation was not pleaded and is therefore waived. The latter contention must be sustained. The bar of the contract limitation must be specially pleaded the same as the bar of the general statute of limitations. *Andes. Ins. Co. v. Fish*, 71 Ill. 620; *Humboldt Ins. Co v. Johnson*, 1 Ill. App. 309; *Fred Miller Brewing Co. v. Capital Ins. Co.*, 111 Iowa 590, 82 N. W. 1023, 82 Am. St. 529; Joyce, Insurance §3223.

It is next contended that there was no proof of the execution of the bond by appellant. There are two answers to this objection. First, on the former appeal this court said: "The answer denied each and all of these allegations, but pleaded certain affirmative defenses, in which the execution and conditions of the building contract and indemnity bond were substantially admitted." Second, the offer of the original bond in evidence at the trial was accompanied by the following statement: "If your honor please, by agreement this bond of the Title Guaranty and Surety Company indemnifying the Helmers against loss is admitted by consent of both counsel." No objection was interposed to the offer in this form, and the bond itself was admitted without objection. Under such circumstances the objection now urged cannot be entertained.

It is further contended that there was no proof that the appellant failed to indemnify the respondents, and *Church v. Campbell*, 7 Wash. 547, 35 Pac. 381, is cited in support of the rule that such proof is indispensable in actions of this

kind. That was an action on an attachment bond, conditioned that the plaintiff in the attachment would pay all costs that might be adjudged to the defendant and all damages which he might sustain by reason of the attachment, and the court was discussing the failure to allege nonpayment of the costs and damages by the plaintiff in the attachment suit, not nonpayment by the surety after breach of condition of the attachment bond. An allegation of nonpayment by the plaintiff in the attachment suit was there necessary to show a breach of condition of the bond, while here a breach of condition was clearly shown by proof of satisfaction of the judgment recovered against the property, and the burden was upon the appellant to show payment or performance the same as in any other case. These were affirmative defenses to be alleged and proved by the appellant.

The other assignments of error are without merit and require no special consideration. Judgment affirmed.

CROW, MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8135. Department One. November 6, 1909.]

THE CITY OF SEATTLE, *Respondent*, v. JAMES R. STIRRAT *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—POWERS—OFFICERS—LIABILITY OF CITY FOR MISFEASANCE—IMPROVEMENTS—FUNDS. In the matter of local improvement contracts, a city exercises proprietary or private functions as distinguished from governmental or public functions; and for this reason must answer for misfeasance of its officers and is responsible for money paid to the city comptroller under a long established practice or custom, and appropriated by that officer, although the charter provides for the payment of moneys into the city treasury; the moneys received for such improvements not being "moneys of the city" within the charter meaning of the term, especially where the indebtedness created for such improvements is a charge against the property and not a debt of the city.

[1]Reported in 104 Pac. 834.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 28, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

C. A. Riddle and *Peters & Powell*, for appellants.

Scott Calhoun and *Bruce C. Shorts*, for respondent.

CHADWICK, J.—This is an action brought by the city of Seattle against Stirrat & Goetz and the United States Fidelity & Guaranty Company, to recover the sum of $400. In making local improvements in the city of Seattle, certain preliminary expenses are incurred to cover cost of surveys, advertising, and a list of owners of property to be affected by the improvement, as well as all other expenses incidental to letting the main contract. The city advanced the money to meet these expenses from its general fund, and the amount so advanced is known as the "fixed estimate," and is charged against the proposed improvement to be thereafter laid against the property benefited, together with the actual cost of the work. To insure the repayment of this advance, the city requires that the amount thereof be repaid by the contractor.

In August, 1901, defendants Stirrat & Goetz were awarded a contract for the improvement of certain streets, all as provided by the terms of Ordinance No. 6,818, creating local improvement fund district No. 403, wherein it was provided that payment should be made by the issuance of local improvement bonds chargeable upon district No. 403. It was also provided that, from time to time as the work progressed, payments should be made, up to seventy per cent of the whole contract price. It was further expressly provided that no bonds or warrants should be issued in any event for the thirty per cent reserved, until Stirrat & Goetz should have paid in coin the par value of enough bonds or warrants to cover the initial cost advanced from the general fund, which in this case

was $400. The thirty per cent retained to cover possible liens etc., was, after a certain time, paid to Stirrat & Goetz, but it is now asserted by the city that the $400 due from them was never paid, and this action is brought to recover it. The admitted facts show that, during all the times the contract was under way, one John Riplinger was city comptroller of the city of Seattle, and that it was his duty to keep in charge and deliver the bonds to cover the "fixed estimates" to the contractor; that at the time Stirrat & Goetz received the thirty per cent balance due on their contract, they drew a check to the city comptroller, and received bonds to the par value of $400. A copy of the check and its endorsements follows:

$400.00 No.....

Seattle, Wash., March 24, 1902.

The Washington National Bank
United States Depository.

Pay to City Comptroller or order Four Hundred 00-100 Dollars.
Final on Thirteenth Ave.

(Stamped on the face thereof) Stirrat & Goetz.
PAID
R Apr. 17, 1902.
Washington National Bank
Seattle, Wash.
(Endorsed thereon)
Jno. Riplinger,
City Comptroller.

This money was never paid into the treasury by Riplinger, but, so far as the record in the present case shows, was appropriated to his own use. In July, 1907, the city made demand on Stirrat & Goetz for the payment of the $400, which being refused, this action was instituted against them and their bondsmen. The bond company defaulted, but to the complaint Stirrat & Goetz made answer, setting up various defenses, asserting that for a long time the mayor and council had, otherwise than by resolution or ordinance, put the matter of dealing with these "fixed estimates" under the exclusive direction and control of the comptroller; that the contract under which they operated required that the warrants re-

ceived by them in payment of the "fixed estimates" should be immediately indorsed payable to the city comptroller, and that such was the exclusive custom; that during twelve years they had, in all of a large number of contracts, been authorized, directed, and permitted to pay to the city comptroller the amount of the "fixed estimates," and that the custom prevailed with all other contractors; that the comptroller was the financial agent of the city, and it was his duty to keep and countersign all bonds issued by the city, and that the only manner in which a contractor for local improvements could obtain such bonds was to receive them from the comptroller, paying to him the excess of the moneys due to cover the "fixed estimate." They also plead other defenses, setting up the knowledge of the city of this custom during all the time intervening between the appropriation of the money by Riplinger and the commencement of this action; and by way of a further defense they plead an estoppel. Demurrers were sustained to the several defenses, and defendants have appealed.

It will be seen that the pith of this case lies in the legal authority of the comptroller to receive money from these appellants. The city contends, and the trial court held, that the duties of the comptroller and treasurer being defined by the city charter, and it nowhere appearing that the comptroller had any authority to receive any money for or on account of the city, and the contract having provided explicitly that the money for the "fixed estimate" should be paid into the city treasury, this case falls within that line of cases holding that one who deals with a public officer is charged with a knowledge of his duties, and the limitations upon his powers and authority, and cannot, by any act of his own, make the officer an agent of the public in any transaction, unless it is put upon him in virtue of some statute or the fundamental law; that the payment of money, if made to an officer who has no authority to receive it, is voluntary, and while there may be a moral obligation on the part of the person receiving it to pay it over to the proper custodian,

it is not a legal obligation, and that the agency, if any exists, is between the individuals, and the city is not bound. There are, of course, many cases holding to this rule, although it is not universal. It is most frequently invoked in embezzlement cases, of which respondent suggests the following: *Sherrick v. State*, 167 Ind. 345, 79 N. E. 193; *Hartford Fire Ins. Co. v. State*, 9 Kan. 210; *State v. Spaulding*, 24 Kan. 1, as decisive of this case. In the first of these cases—and it is but a type of all the others—it was held that money paid to a state auditor by insurance companies for license fees was not a payment to the state within the terms of the law that provided that all such moneys should be paid to the state treasurer.

Without committing ourselves to this doctrine—it may be admitted so far as this case is concerned—the question before us strikes deeper, and depends upon other considerations. It involves an inquiry into the authority and power of the city in the exercise of its several functions. A municipal incorporation possesses a two-fold character. It exercises under a grant or charter a part of the sovereign power of the state, but in thus exercising its power and to promote the ends of government and the convenience of its inhabitants, it may, and frequently does, act as an agent for the citizen.

"The distinction between these, though sometimes difficult to trace, is highly important, and is frequently referred to, particularly in the cases relating to the implied or common-law liability of municipal corporations for the negligence of their servants, agents, or officers in the execution of corporate duties and powers. On this distinction, indeed, rests the doctrine of such implied liability. In *its governmental or public character*, the corporation is made, by the state, one of its instruments, or the local depositary of certain limited and prescribed and political powers, to be exercised for the public good on behalf of the state rather than for itself. In this respect it is assimilated, in its nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. Over all its civil, political, or governmental powers, the

authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in the constitution of the particular state. But *in its proprietary or private character*, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the compact community which is incorporated as a distinct *legal personality* or *corporate individual*; and as to such powers, and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded *quoad hoc* as a private corporation, or at least not public in the sense that the power of the legislature over it or the rights represented by it, is omnipotent." Dillon, Municipal Corporations (4th ed.), §66.

"In its governmental or public character, it represents the state, while in the other it is a mere private corporation. As a political institution, the municipality occupies a different position, and is subject to different liabilities from those which are imposed upon the private corporation. But because these two characters are united in the same legal entity, it does not follow that the shield which covers the political equally protects the private corporation." *Cincinnati v. Cameron*, 33 Ohio St. 336, 367.

See, also, 20 Am. & Eng. Ency. Law (2d ed.), 1131.

With reference to its first or governmental power, it acts strictly as a public corporation. It is held by its charter and cannot be bound by any act committed *ultra vires* by its officers. It is upon this principle that the cases of *Paul v. Seattle*, 40 Wash. 294, 82 Pac. 601, and *Arnott v. Spokane*, 6 Wash. 442, 33 Pac. 1063, must be held to rest. In the exercise of its proprietary or private functions, it is held to its private contracts, and is subject to estoppels as is any private corporation.

"When the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire. It is performing a function, not governmental, but often committed to private corporations

or persons, with whom it may come into competition. The function may be municipal but the method is not. It leads to profit, which is the object of the private corporation. Some courts and authors therefore term the municipality in this aspect a quasi-private corporation." 28 Cyc. 125.

The power to grade streets, lay sewers or water pipes, and to lay the cost thereof upon abutting property is not a governmental or public function in the strict sense. It has nothing to do with the raising or disbursing of the public revenue, with improvements which affect the whole public in like degree, the preservation of the public health, or the exercise of the police power. The method of doing such work is left to the city, but in its exercise it neither receives or disburses "public funds" or the "moneys" referred to in its charter. It collects the tribute of the property owner paid, in theory at least, voluntarily, and disburses it in such manner as it may provide, so long as it does not contravene the general law. It may, in the exercise of this function, provide by ordinance or by a practice or custom long adhered to, notwithstanding the provision in the particular contract, that the money so collected may be paid into any depositary, a bank if it sees fit, to be thereafter covered into the treasury by its agent. The agency is not one growing out of the charter, but is dependent upon the contract or conduct of the city. Nor is it any answer to say that the work performed by appellants was of general interest and benefit to the whole public.

"But the distinction is quite clear and well settled, and the process of separation practicable. To this end, regard should be had, not so much to the nature and character of the various powers conferred, as to the object and purpose of the legislature in conferring them. If granted for public purposes exclusively, they belong to the corporate body its public, political or municipal character. But if the grant was for purposes of private advantage and emolument, though the public may derive a common benefit therefrom, the corporation *quoad hoc*, is to be regarded as a private company." *Bailey v. Mayor etc. of New York*, 3 Hill 531, 539.

See, also, *Hart v. Bridgeport*, 13 Blatchf. 289.

There is nothing in the general law to warrant the assumption that the sovereign power of the state is involved in grading streets for the benefit of private property. Certainly mandamus would not lie to compel it, nor would injunction lie at the instance of a citizen whose property was not immediately affected. The moneys received in aid thereof are not "moneys of the city" within the charter meaning of the term, but may be funds of the city within the terms of their contract, or in the sense that it is the duty of the city to collect and disburse them. It is only moneys raised by the operation of some general law that become "moneys of the city," or "moneys belonging to the city," or "public funds," or "public moneys," and subject to the charter provision with reference to their deposit. Such laws, whether they be general or special, can have no reference to such funds as may come to a municipality through methods with which the public as a whole has no concern. *State ex rel. Johnson v. Clausen.* 51 Wash. 548, 689, 99 Pac. 743, 101 Pac. 835.

"The term 'public money,' as used in the statutes of the United States, ordinarily means the money of the Government, received from the public revenues or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same wherever it may be. Such money, when illegally obtained therefrom, may be followed by the Government into the hands of the wrong-doer and recovered as a debt due from him, with the preference over other creditors in the distribution of his assets in case of insolvency given to the United States by statute. (*Bayne et al. v. The United States*, 93 U. S., p. 642. It does not include the money of states, counties, cities and towns, although with reference to those governments and municipalities such funds in other connections would be deemed public money. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them under authority of law to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held for individual litigants, and not for the public as represented by the Government." *Branch v. United States*, 12 Ct. Claims, 281, 289.

Our reasoning further finds assurance in the fact that indebtedness incurred for these purposes has been held to be no part of the general indebtedness or funds of a municipal corporation. If they were debts or funds within the meaning of the charter or constitutional definition of the term, it must have been held otherwise. It therefore seems plain that, in the execution of its trust, the city of Seattle might have contracted directly that the amount involved in this case could be paid directly to its comptroller; and, if it could, it is subject to such implications as the law throws around its persistent practice and continued conduct. While one paying "public funds" into the hands of the comptroller might pay at his peril, the act being *ultra vires*, the city must answer for the misfeasance of its officer who has assumed with its knowledge to perform a function incident to its proprietary character. This is especially so when we consider that the city charter expressly provides that the city comptroller "shall perform such other duties as this charter or the city council may direct."

The judgment of the lower court is reversed, with directions to let the case proceed in accordance with this opinion.

RUDKIN, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 8332. Department One. November 6, 1909.]

E. M. GORDON, *Respondent*, v. FREDERICK S. BRINTON *et al.*, *Appellants*.[1]

PRINCIPAL AND AGENT—CONTRACTS—LIABILITY OF AGENT TO THIRD PERSON. Whether agents are personally bound by their contract to sell and guarantee any article depends upon the mutual intent of the parties.

SAME—EVIDENCE—SUFFICIENCY. Sellers of an electric motor, who were agents of a motor company, are personally bound upon their contract, and cannot set up agency as a defense, where they signed as principals, there was nothing to disclose that they contracted as agents, or that the company was interested in or had authorized

[1]Reported in 104 Pac. 832.

the contract, and the parties acted upon the special warranty which called for the seller's approval of the installation; especially where they pleaded no agency, but set up a counterclaim for the balance due.

Appeal from a judgment of the superior court for King county, Tallman, J., entered December 19, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Vince H. Faben and *S. H. Kelleran*, for appellants.

Byers & Byers, for respondent.

CHADWICK, J.—This action is brought to recover for the breach of a contract evidenced by the following memorandum:

"Mr. E. M. Gordon,

"Seattle, Wash.

"Dear Sir: We acknowledge herewith receipt of ninety-seven dollars and fifty cents ($97.50) being 25 per cent. payment on two Roberts motors which we agree to deliver to you for the sum of three hundred and ninety dollars ($390) f. o. b. Seattle. The complete outfit will consist of the following:

"One model P Roberts motor with two cylinders rated at 15-18 H. P. with 5-A equipment as described in catalogue and one ejector muffler.

"One model H 1½-2 H. P. with single cylinder 3-2½-inch with complete equipment 4-A as described in Roberts Motor Company catalogue.

"Terms of payment are to be 25 per cent with order and the balance payable by sight draft with the bill of lading.

"We agree to take the motors back and refund you the price in full if the engines do not prove to be all that the catalogue describes them to be, and if when they are properly installed to our approval they do not give complete satisfaction in regard to ease in starting, lack of vibration and reliability. Yours very truly, Lee & Brinton."

Plaintiff paid the sum of $97.50 and upon delivery of the model P motor, he paid the additional sum of $245. The model H motor was never received by him, nor has he paid

any part of the balance of $47.50 due on the contract. The larger motor was installed in a launch belonging to plaintiff, by parties suggested by defendants. They also took considerable interest in the motor after it had been installed. After several trials, at which plaintiff was present, the motor did not work to his satisfaction. He notified defendants that he rejected the motor, and brought this action to recover the purchase price. After a trial before the court without a jury, judgment was rendered in favor of the plaintiff, and defendants have appealed.

The principal defense interposed, or rather argued in appellants' brief, is that respondent contracted with them as agents merely, well knowing that they had no interest in the contract; and that his cause of action, if any, is against the Roberts Motor Company, and not against them. In addition to this general defense, it is urged that the boat was too heavy for the engines, that the motor did, in fact, run so as to meet the terms of the contract, that it was not installed in a proper way, that its failure to run and give satisfaction was due to salt water in the cylinders resulting from improper installation, and that its installation was not in any event to be approved by them. They further set up the balance of the purchase price as an affirmative defense, and asked judgment therefor.

It is urged by appellants that one who deals with an agent, known and acting as such for a disclosed principal, must sue the principal, in the absence of an open pledge of the agent's credit. Without discussing the authorities cited, it may be admitted that this is a general rule of law, accepted and applied in all proper cases. The text controlling this case is well stated in *Whitney v. Wyman*, 101 U. S. 392, 25 L. Ed. 1050:

"As the meaning of the law-maker is the law, so the meaning of the contracting parties is the agreement. . . . If the contract be unsealed and the meaning clear, it matters not how it is phrased, nor how it is signed, whether by the agent for the principal or with the name of the principal by

the agent or otherwise. The intent developed is alone material, and when that is ascertained it is conclusive. Where the principal is disclosed, and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so."

The intent in such contracts is not a unilateral or reserved intent. It must be mutual, or there must be some fact or circumstance sufficient to create notice of the agency. We have read the testimony with strict purpose to find anything that would indicate an intent on the part of either of the parties to act other than as principals in this case. If, in fact, appellants have dealt with reference to a particular subject-matter as principals, making a promise on their own account, and respondent relied upon their promise and not upon the alleged principal, they are bound in law. The contract is clearly an agreement to receive the motor back if it refuses to work in the particulars enumerated. There is nothing disclosed to indicate that appellants were not selling it on their own account. Certainly respondent is not put upon notice of an agency under a contract that breathes ownership in the parties who engage to deliver a motor and to guarantee it.

"At this day the law must be considered as settled, that a vendor or purchaser dealing in his own name, without disclosing the name of his principal, is personally bound by his contract; and it makes no difference that he is known to the other party to be an auctioneer, or broker, who is usually employed in selling property as the agent for others. Even where he discloses the name of his principal, if he signs a written contract in his own name merely, which contract does not upon its face show that he was acting as the agent of another, or in an official capacity in behalf of the government, he will be personally bound thereby." *Mills v. Hunt*, 20 Wend. 431.

See, also, *Simonds v. Heard*, 23 Pick. 120, 34 Am. Dec. 41; 1 Am. & Eng. Ency. Law, p. 1121.

No testimony was offered to show that the motor company was a party to the contract, or had in any manner author-

ized the special warranty upon which respondent relied. In fact, we take it from their correspondence, introduced as an exhibit by appellants, that they were acting independently of any agreement respondent may have had with Lee & Brinton. The binding character of the contract seems conclusive upon its face, and especially so when the parties have acted the contract as drawn. Appellants recommended proper persons to install the motor, and when it was done, undertook to successfully demonstrate its efficiency. They explain their conduct by saying that they were only interested in seeing the motor work, and felt under no duty as to its installation. But they are bound by their acts. It may be noted that appellants do not plead an agency, but set up an affirmative demand for the balance of the contract price. This alone is sufficient to bind them to the contract as it is written.

Appellants rely with much assurance upon the case of *Tripple v. Littlefield*, 46 Wash. 156, 89 Pac. 493. In that case the rule we have here announced was recognized, but the court found from the facts that the agents had not openly pledged themselves and that the plaintiff not only had notice of the agency, but dealt with defendants as agents and not as principals. In this case, while respondent says on cross-examination that he supposed appellants were agents, yet nevertheless he says he made his contract with them and not with the company, a conclusion which we find to be borne out by the evidence considered as a whole. The legal liability of appellants being established, the other propositions advanced depend on the weight of the evidence, which we find to be sufficient to warrant the findings and conclusions of the court. Judgment affirmed.

RUDKIN, C. J., FULLERTON, MORRIS, and GOSE, JJ., concur.

[No. 8134. Department One. November 6, 1909.]

C. SMITH *et al.*, *Respondents*, v. THE CITY OF CENTRALIA, *Appellant*.[1]

MUNICIPAL CORPORATIONS — STREETS — VACATION—ABUTTING OWNERS—RIGHTS. An abutting property owner on a street has an interest different in kind from that of the public, where the street is vacated so as to close or affect his access, and may maintain an action to set aside an illegal vacation.

SAME—POWER OF COURTS—INVALID ORDINANCES. The courts have power to set aside a vacation of a street, although the same is a legislative function, where the law or ordinance is invalid and an attempt to enforce it is made or threatened.

SAME—STATUTORY PROCEEDINGS—VALIDITY OF VACATION. The vacation of a street pursuant to Laws 1901, p. 175, is invalid, where the petition was not signed by the owners of more than two-thirds of the private property abutting upon that part of the street, the notice was not given, and the ordinance vacated part of the street not described.

EMINENT DOMAIN —"PROPERTY"— VACATING STREETS — COMPENSATION. The interest of an abutting property owner in the maintenance of the street is property of which he cannot be deprived until just compensation has been paid.

MUNICIPAL CORPORATIONS — ORDINANCE — ADOPTION — INTEREST OF COUNCILMEN. An ordinance vacating a street is invalid where a councilman who cast the deciding vote for its passage was one of the petitioners, and would profit by its enactment.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered February 1, 1909, in favor of the plaintiffs, upon overruling a demurrer to the complaint, in an action to set aside an ordinance vacating a street. Affirmed.

B. H. Rhodes, *Geo. Dysart*, and *C. D. Cunningham*, for appellant.

Reynolds & Stewart, for respondents.

FULLERTON, J.—The record discloses that on September 8, 1908, certain persons owning property in the city of Cen-

[1]Reported in 104 Pac. 797.

tralia petitioned the city council of that city to vacate that part of Tower Avenue, a street therein, fronting on block five of Hanson's First Addition to Centralia, for a width of six feet. Pursuant thereto the city council passed an ordinance purporting to vacate not only that part of the street requested, but also a part of the street six feet in width fronting on block one, lying immediately north of block five, for a distance of nearly five hundred and fifty feet. It was not recited in the petition for vacation that the portion of the street sought to be vacated, or the street itself, was not used by the public or the adjoining property holders, nor did it recite that any public necessity required the vacation of the street. Nor did the ordinance purporting to vacate the street make any such recitals, nor was any provision made therein, or otherwise, for compensating property holders whose property should be taken or damaged by such vacation. The record also discloses that the petitioners for the proposed vacation did not own two thirds of the private property abutting upon the street sought to be vacated, nor did the owners of two thirds of the property abutting thereon consent to such vacation. It also appeared that one of the petitioners was a member of the city council of the city of Centralia, and owned property on that part of the street proposed to be vacated, which would receive an accretion arising from such vacation; that the city council consisted of seven members, three of whom voted against the passage of the ordinance vacating the street, and four in favor of the ordinance, one of whom was the petitioning councilman whose property would be benefited by the vacation.

This action was brought by the respondents to set aside the purported vacation of the street. The plaintiffs therein are the owners of property abutting upon Tower Avenue on the side of the street opposite to that part of the street vacated. To their complaint, setting out the foregoing facts, and the further fact that their property would be damaged by the vacation of the part of the street sought

to be vacated, the city demurred, and, on its demurrer being overruled, elected to stand thereon, whereupon judgment annulling and setting aside the ordinance was entered.

The appellant first contends that the respondents have no capacity to sue; that such injuries as they will suffer by reason of the vacation of the street, while they may differ in degree, will not differ in kind from that suffered by the general public. But this position is not tenable. The rights which an owner of abutting property possesses in a street are different in kind from that possessed by one whose interest is only that of a right of way along the street. To close or partially close a street affects the right of ingress and egress to and from the property of an abutting owner, makes it possible to curtail his supply of light and air, and otherwise affects the value of his property; while a property owner whose right in the street is a mere right of way over it as one of the public does not suffer these particular injuries to his property. His loss, if any, unless the street be the only passageway from his property to the main public highways, arises from the fact that the way to and from his property is less convenient than it was before, and the courts are united in saying that this, while it may differ in degree, does not differ in kind from the injury suffered by the general public. *Ponischil v. Hoquiam Sash etc. Co.*, 41 Wash. 303, 83 Pac. 316. Where, however, the effect of closing the street or highway is to close the only passageway a property owner has from his property to the main public ways, such an owner may properly challenge the action by a suit in court, even though he be not an abutting property owner. It was so held by this court in *Smith v. Mitchell*, 21 Wash. 536, 58 Pac. 667, 75 Am. St. 858; *Dawson v. McMillan*, 34 Wash. 269, 75 Pac. 807; and in *Carl v. West Aberdeen Land & Imp. Co.*, 13 Wash. 616, 43 Pac. 890. In *Heller v. Atchinson etc. R. Co.*, 28 Kan. 625, where the question of the right to vacate a street was in question, the court said:

"Where a party owns a lot which abuts on that portion of the street vacated so that access to the lot is shut off, it

is clear that the lot owner is directly injured, and may properly challenge the action. The closing up of access to the lot is the direct result of the vacating of the street, and he, by the loss of access to his lot, suffers an injury which is not common to the public."

So in this case, while the vacation is only partial, its effect is to specially injure *pro tanto* the respondent's property, and they may therefore properly maintain an action to set aside the order of vacation.

The appellant next contends that the act of the city council in vacating this portion of the street was the exercise of a legislative function delegated to it by the legislature itself, and that the courts are without power to interfere with its exercise of the function or inquire into the manner in which it is exercised. It undoubtedly is a general rule that the courts will not interfere with an action of a body exercising legislative functions, to correct mere errors or mistakes in its proceedings, or to prevent the passage of a law or ordinance duly pending before a legislative body, because it may conceive that the law or ordinance will be ineffective if passed, but clearly the courts have power to inquire into the validity of a law or ordinance after it has passed the legislative body and an attempt to enforce it is made or threatened to the injury of the personal or property rights of the citizen. The courts have exercised this power since the foundation of the government, and it is not necessary now to enter into a discussion of the principles that are thought to justify it.

On the question of the validity of the ordinance we are clearly of the opinion that it is invalid. The law delegating to municipalities the power to vacate streets, Laws 1901, p. 175, prescribes a mode for its exercise and the conditions upon which it can be exercised. It provides that the vacation shall be made by ordinance; that the proceeding shall be initiated by a petition giving a description of the property to be vacated, signed by the owners of more than two thirds of the private property abutting upon the part of such street or alley sought to be vacated; that upon presentation of the

petition, the city council shall by resolution fix a time when the petition shall be heard and determined, of which hearing the city or town clerk shall give twenty days' notice by a written or printed notice set up in three of the most public places of the city or town in which the street or alley is situated, and a like notice on the street or alley. It is alleged in the complaint, and admitted by the demurrer, that these conditions were not even substantially complied with; that the petition presented did not describe the property sought to be vacated by the ordinance; that it was not signed by the owners of more than two thirds of the private property abutting upon the street sought to be vacated, or by owners of more than one eighth of such property, and that there were other defects in the proceedings. These were matters going to the power of the council to act, and without a substantial compliance with them, any ordinance of vacation based thereon must be void.

Moreover, it is alleged that the respondent's property will be specially damaged by the vacation of this part of the street, and that the amount of such damages was not ascertained or paid into court for them, and no means provided by which their damages could be ascertained. The ordinance was void for this reason. The interest an abutting property holder has in the maintenance of a street or highway is property. This property, under the constitution, cannot be taken or damaged until just compensation has been first made to the owner, or paid into court for him, unless compensation be expressly waived. Const., art. 1, § 16.

The ordinance is invalid for another reason. A councilman who cast the deciding vote for the passage of the ordinance was one of the petitioners for the ordinance, and one of the persons who would profit by its enactment. He was, therefore, in effect adjudicating his own cause, in violation of a maxim as old as the law itself.

The judgment is affirmed.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8211. Department One. November 8, 1909.]

CHARLES H. GRAY, *Respondent*, v. NEAL BOYLE, *Appellant*.[1]

BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER IN DUE COURSE—NEGLIGENCE. One who purchases a note for value before maturity without notice of any defect, is a holder in due course, within Laws 1899, p. 350, §§ 52, 56, and his rights cannot be defeated without proof of actual notice of defects or bad faith, even if he omitted precautions or was negligent.

BILLS AND NOTES—BONA FIDE PURCHASERS—LEGALITY OF CONSIDERATION—VIOLATION OF STATUTE—EFFECT. Laws 1905, p. 373, prohibiting insurance rebates does not invalidate a note given for the premiums in violation of the statute, as against a holder of the note in due course; since it is not the policy of the law to render negotiable paper void in the hands of innocent holders where the statute has not so expressly declared.

Appeal from a judgment of the superior court for King county, Frater, J., entered April 12, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a promissory note. Affirmed.

Dudley G. Wooten, for appellant.

Henry S. Noon, for respondent.

RUDKIN, C. J.—This action was instituted on a promissory note, in the usual form, to recover the sum of $233.36, with interest and stipulated attorney's fees. The note was made payable to the order of C. D. Behan, but was endorsed to the plaintiff for value before maturity. The principal defense interposed was that the note was given in part payment of the annual premium on a policy for $2,000 in the New York Life Insurance Company, of which the payee, Behan, was agent, and that a rebate of $16.64 was allowed to the insured, in violation of the anti-rebate act of March 14, 1905, Laws of 1905, p. 373, which provides as follows:

"Section 1. No life insurance company doing business in this state shall make or permit any distinction or discrimina-

[1]Reported in 104 Pac. 828.

tion in favor of individuals between insurants of the same class and equal expectation of life in the amount or payment of premiums or rates charged for policies of life or endowment insurance, or in the dividends or other benefits payable thereon, or in any other of the terms and conditions of the contracts it makes; nor shall any such company or any agent thereof make any contract of insurance, or agreement as to such contract, other than as plainly expressed in the policy issued thereon; nor shall any such company or agent pay or allow, or offer to pay or allow as inducement to insurance, any rebate of premiums payable on the policy, or any special favor or advantage in the dividends or other benefits to accrue thereon; or any valuable consideration or inducement not specified in the policy contract of insurance.

"Sec. 2. Every corporation violating any of the provisions of this act shall be fined in any sum not exceeding five hundred dollars.

"Sec. 3. Every officer or agent of any such corporation who shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor and shall be fined in any sum not exceeding five hundred dollars or imprisonment in the county jail not exceeding six months."

The court below found that the plaintiff was a holder of the note in due course, as that term is defined in the negotiable instruments act, and gave judgment according to the prayer of the complaint. From that judgment the defendant has appealed.

We will assume at the outstart that the note was invalid as between the original parties and subsequent holders with notice, by reason of the violation of the anti-rebate act. This leaves but two questions for consideration. First, was the respondent a holder in due course; and second, if so, does the anti-rebate act invalidate the note in his hands.

(1) As already stated, the court found that the respondent was a holder in due course, and this finding is amply sustained by the testimony. A holder in due course is defined by our statute as follows:

"Sec. 52. A holder in due course is a holder who has taken the instrument under the following conditions:

"(1) That it is complete and regular upon its face;

"(2) That he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact;

"(3) That he took it in good faith and for value;

"(4) That at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." Laws 1899, p. 350.

"Sec. 56. To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." Laws 1899, p. 350.

The respondent purchased the note for value before maturity, and at the time of his purchase had no notice of any defect or infirmity in the instrument. The chief circumstance upon which the appellant relies to establish *mala fides* is the fact that the respondent knew that Behan was an insurance agent, and that the note was given in whole or in part in payment for an insurance premium. The rule by which the good faith of a holder of negotiable paper is to be determined is thus stated in Crawford's Annotated Negotiable Instruments Law (3d ed.), p. 68:

"The holder is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; he does not owe to the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith. The rights of the holder are to be determined by the simple test of honesty and good faith, and not by a speculative issue as to his diligence or negligence. The holder's right cannot be defeated without proof of actual notice of the defect in title or bad faith on his part evidenced by circumstances. Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted *mala fide*, his title, according to settled doctrines, will prevail."

This rule is fully supported by the authorities, and, measured by it, the title and good faith of the respondent were not impeached.

(2) Law writers substantially agree upon the defects which will invalidate commercial paper in the hands of a *bona fide* holder.

"The same doctrine will generally apply to all cases of a *bona fide* holder for value without notice before it comes due, where the original note, or the indorsement thereof, is founded on an illegal consideration; and this, upon the same general ground of public policy, without any distinction between a case of illegality founded in moral crime or turpitude, which is *malum in se*, and a case founded in the positive prohibition of a statute, which is *malum prohibitum;* for, in each case, the innocent holder is, or may be, otherwise exposed to the most ruinous consequences, and the circulation of negotiable instruments would be materially obstructed, if not totally stopped. The only exception is, where the statute creating the prohibition has, at the same time, either expressly or by necessary implication, made the instrument absolutely void in the hands of every holder, whether he has such notice or not. There are but few cases in which any statute has created a positive nullity of such instruments, either in England or America. The most important seem to be the statutes against gaming, and the statutes against usury. And the policy of these enactments has been brought into so much doubt in our day that in England the rule as to usury and gaming and some other cases has been changed by recent statutes; and a total repeal, or partial relaxation of it, has found its way into the legislation of America." Story, Promissory Notes, § 192.

See, also, 3 Kent, p. 80; Daniel, Negotiable Instruments, § 197 (2) and § 198.

Frequent application of this rule may be found in the gaming and usury laws of England and the several states, many of which expressly declare that notes and contracts, the consideration for which is usurious loans or money lost at play, shall be null and void. *Irwin v. Marquett*, 26 Ind. App. 383; *Swinney v. Edwards*, 8 Wyo. 54, and cases there cited. In all such cases the note is void in the hands of every holder. From this view of the law there is little or no dissent. On the other hand, the courts agree with equal unanimity that commercial paper is valid in the hands of an innocent holder,

even though the consideration for the note arises out of some contract or transaction prohibited by law, unless the law in express terms declares the instrument void. In *Vallett v. Parker*, 6 Wend. 615, Savage, C. J., said:

"Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but where they are adjudged by the court to be so, for failure or illegality of consideration, they are void only in the hands of the original parties, or those who are chargeable with, or have notice of, the consideration."

This distinction runs through all the authorities. *New v. Walker*, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; *Sondheim v. Gilbert*, 117 Ind. 71, 18 N. E. 687, 10 Am. St. 23, 5 L. R. A. 432; *Union Trust Co. v. Preston Nat. Bank*, 136 Mich. 460, 99 N. W. 399; *Arnd v. Sjoblom*, 131 Wis. 642, 111 N. W. 666, 10 L. R. A. (N. S.) 842; *Sullivan v. German Nat. Bank*, 18 Colo. App. 99, 70 Pac. 162; *Crawford v. Spencer*, 92 Mo. 498, 1 Am. St. 745.

The cases cited by the appellant are not in point, as they all arose between the original parties to the note or their assignees who stood in their shoes. True, the courts said the notes were *void* or *null and void*, but this language must be understood as applying to the case before the court. *Union Trust Co. v. Preston Nat. Bank, supra.* In *State Life Ins. Co. v. Strong*, 127 Mich. 346, 86 N. W. 825, and *Heffron v. Daly*, 133 Mich. 613, 95 N. W. 714, cited by the appellant, the court held similar notes invalid as between the original parties, and in *Citizens' Life Ins. Co. v. Commissioner of Insurance*, 128 Mich. 85, 87 N. W. 126, the court said such notes were void, but the same court afterwards held in *Union Trust Co. v. Preston Nat. Bank, supra*, that a holder in due course might recover on a check certified in violation of law. Little can be added to the exhaustive discussion of the question under consideration to be found in the case last cited. Counsel argues that the act against rebating will be nullified in a large measure if this court upholds the validity of ne-

gotiable instruments taken in violation of its provisions, but this question is for the legislature and not for the courts. For, as said in *Vallett v. Parker, supra*, "It is all important to the commercial world, that courts do not go in advance of the legislature in rendering negotiable paper void in the hands of an innocent endorsee." Any attempt on the part of this court to advance the legislative policy evinced in the anti-rebate act, by declaring commercial paper given in violation of its provisions null and void in the hands of innocent holders, would conflict with the policy so clearly manifested in the negotiable instruments act.

We find no error in the record and the judgment is affirmed.

FULLERTON, CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8017. Department One. November 9, 1909.]

FRANK J. KWAPIL, *Respondent*, v. BELL TOWER COMPANY *et al.*, *Appellants*.[1]

PARTNERSHIP—ACTIONS BETWEEN PARTNERS—SETTLEMENT. Partners cannot recover from a copartner money received by him until after a full settlement of the partnership business.

CORPORATIONS—EXISTENCE—DE FACTO CORPORATIONS—COLLATERAL ATTACK. The failure to execute articles in triplicate and keep one copy in the office of the corporation, does not affect the *de facto* existence of a corporation otherwise duly incorporated, and followed by user; and in such case the incorporation cannot be collaterally attacked in a civil action between the corporation and third persons.

CORPORATIONS—OFFICERS—ACTIONS AGAINST—EVIDENCE — SUFFICIENCY. The evidence is sufficient to show that an officer of a corporation had overdrawn his account, where there was a dispute as to the amount of his salary, but he had kept the books, and entered the salary as claimed by the corporation, had admitted to others that such sum was correct, and that he had overdrawn his account, and the books showed that he had taken more than the salary entered.

[1]Reported in 104 Pac. 824.

Appeal from a judgment of the superior court for King county, Morris, J., entered October 28, 1908, in favor of the plaintiff, upon dismissing defendant's cross-complaint, in an action for the appointment of a receiver for a corporation, and for an accounting. Affirmed in part and reversed in part.

Herr, Bayley & Wilson, for appellants.

John E. Ryan, for respondent.

RUDKIN, C. J.—In the early part of the year 1903 the plaintiff and the individual defendants, Bell, Tower and Kerr, formed a copartnership for the purpose of conducting a general brokerage and commission business in the city of Seattle. The three defendants named contributed $2,500 each towards the capital of the firm, against which the plaintiff agreed to contribute his time and services. The plaintiff claims that he was to receive one-fourth of the profits of the firm business and his living expenses, while the other members of the firm claim that he was to receive one-fourth of the profits and a fixed salary of $60 per month. The terms of the agreement as to the plaintiff's salary is one of the questions to be determined on this appeal. The business of the copartnership was conducted under this agreement until the latter part of the year 1905, during which time further contributions to the firm capital were made.

Late in that year a corporation was formed for the purpose of taking over the copartnership business. Articles of incorporation were filed in the office of the secretary of state, and in the office of the county auditor of King county, and the corporation paid its annual license fee from the time of its incorporation, but it seems that the articles were not executed in triplicate, and that no copy was retained in the office of the company. The business and property of the copartnership was immediately turned over to the new corporation, and the plaintiff became its secretary and general manager, continuing in that position until late in the year

1906. Thereafter the defendants Tower and Kerr occupied the same position in succession. The present action was instituted against the Bell Tower Company, an alleged corporation, and Bell, Tower and Kerr individually, for the appointment of a receiver, an accounting, and for general relief. Inasmuch as the plaintiff's complaint was dismissed, and no appeal has been prosecuted from that part of the judgment, a further statement of his case is not deemed material. The defendant Bell Tower Company filed a cross-complaint against the plaintiff, under which it sought to recover the sum of $2,459.68, alleged to have been withdrawn from the assets of the corporation by the plaintiff. From the judgment dismissing the cross-complaint, the present appeal is prosecuted.

No findings of fact were made, and the record does not disclose the reasons or grounds for the court's decision. If there was no corporation *de jure* or *de facto*, and the respondent and the individual appellants are still copartners, the judgment dismissing the cross-complaint was right and must be affirmed, for in that event the individual appellants would only be entitled to recover from the respondent such sum as might be found due after a full settlement of the partnership business, and no such settlement has been made, and there is nothing in this record upon which a settlement could be decreed. If, on the other hand, the Bell Tower Company is a corporation *de jure* or *de facto*, and the respondent has withdrawn funds from its treasury to which he is not entitled, we see no reason why judgment should not be rendered in favor of the corporation on its counterclaim. We deem it unnecessary to consider whether the Bell Tower Company is a corporation *de jure* so that it could defend against a *quo warranto* proceeding instituted on behalf of the state, for we are clearly of the opinion that it is a corporation *de facto*, and that its existence cannot be called into question collaterally.

"When a body of men are acting as a corporation under color of apparent organization in pursuance of some charter

or enabling act, their legal authority to act as a corporation cannot be questioned collaterally, but only in a direct proceeding in the nature of *quo warranto*." Taylor, Private Corporation, §145.

"Color of apparent organization under some charter or enabling act," says the supreme court of Minnesota, "does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure;* but, if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*." *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150, 38 Am. St. 552.

The only defect pointed out in the organization of the appellant company was the failure to execute its articles in triplicate, and to retain one copy in the office of the company. In our opinion there was a substantial compliance with the law, and the appellant company is a corporation *de jure*, but in any event the attempted organization was followed by user, and the existence of the corporation cannot be inquired into in this collateral proceeding.

The only remaining question is, Did the respondent withdraw money from the treasury of the corporation to which he was not entitled? The books kept by the respondent show that he withdrew $1,057.03 over and above one-fourth of the profits and his salary computed at $60 per month, and if his salary was fixed in that sum the corporation was entitled to judgment for the overdraft. The respondent testified, in substance, that he gave up a salary of $1,500 per annum in Montana to join the copartnership, that he did not know what it would cost to live in Seattle, and that while $60 per month was suggested, his copartners expressly agreed that he should have his living expenses in addition to one-fourth of the profits. A letter written by the respondent to the appel-

lant Tower, shortly before the formation of the copartnership, shows that the respondent was receiving a salary of $85 per month in cash, his room free, and board at reduced rates, which would make his monthly salary equal to about $100. It would seem improbable that business men residing in another state would enter into so flexible and indefinite a contract as that for which the respondent contends. He kept the books of the corporation and copartnership himself, and entered his salary upon these books at $60 per month.

As against the testimony of the respondent we have the testimony of two of the appellants who were present when the copartnership agreement was made. They testify explicitly that the respondent was to receive one-fourth of the profits and $60 per month, and no more. A third witness, present in Seattle when the affairs of the company were under discussion, testified that the respondent stated, or admitted in his presence, that $60 per month was the salary agreed upon. The last-named witness and others also testified that from time to time the respondent admitted to them, or in their presence, that he had overdrawn his account with the corporation to the amount shown by the books, and promised to refund the same. Under this testimony we have no hesitation in saying that the appellant Bell Tower Company is entitled to judgment against respondent in the sum shown by his entries in the books of the company.

The judgment of the court below is therefore reversed as to the appellant Bell Tower Company, with instructions to enter judgment in its favor against the respondent in the sum of $1,057.03, with interest and costs. As to the individual appellants, the judgment of dismissal is affirmed.

CHADWICK, GOSE, and FULLERTON, JJ., concur.

MORRIS, J., took no part.

[No. 7871. Department Two. November 9, 1909.]

THE STATE OF WASHINGTON, *Respondent*, v. JOHN CARROLL, *Appellant*.[1]

CRIMINAL LAW—VENUE—RIGHT TO TRIAL BY JURY OF VICINAGE. Bal. Code, § 6791, providing that when property taken by burglary, etc., in one county has been brought into another county, the jurisdiction is in either county, violates Const., art. 1, § 22, providing that the accused shall have the right to a trial by a jury of the county in which the offense is alleged to have been committed; and a demurrer should be sustained to an information for burglary committed in one county, filed in another county into which the property was alleged to have been taken.

Appeal from a judgment of the superior court for King county, Frater, J., entered March 28, 1908, upon a trial and conviction of the crime of burglary. Reversed.

McBurney & Cummings, for appellant.

DUNBAR, J.—This is an appeal from a judgment of the superior court for King county, upon a trial and conviction for the offense of burglary. The information was as follows:

"They, said James Ryan, alias James Bain, and John Carroll, and each of them, in the county of San Juan, state of Washington, on the 20th day of January, A. D. 1908, the dwelling house of one Hulen Adkinson and one H. Hori, the same being that certain stateroom numbered 20 on that certain ship or steamboat known as the Steamship Ramona, and being a place or building in which goods and valuable things were then and there kept for use and deposit, did then and there wilfully, unlawfully, feloniously, and burglariously break and enter, with intent then and there to commit a felony or misdemeanor, and did then and there, and in the commission of said burglary, the sum of $9 in lawful money of the Dominion of Canada, of the value of $9 in lawful money of the United States, and the sum of $1 lawful money of the United States, all of the total value of $10 in lawful money of the United States, the property of said Hulen Adkinson, take, steal and carry away, and said James Ryan

[1]Reported in 104 Pac. 814.

alias James Bain and John Carroll, and each of them did thereafter on said 20th day of January, A. D. 1908, bring into the county of King, in said state of Washington, said property so taken in the commission of said burglary."

This information was demurred to, the demurrer was overruled, the case was tried by a jury, verdict of guilty was found, motion for new trial was overruled, judgment was entered, and sentence pronounced to a term in the penitentiary.

The demurrer to this information should have been sustained. The information charged specifically the crime of burglary. The jury found that the defendant was guilty of burglary, the judgment of the court was that the defendant was guilty of the crime of burglary, and he was sentenced for the crime of burglary. The statement in the information, that the defendants thereafter brought into the county of King the property so taken in the commission of said burglary, does not affect the character of the information or the crime charged, and was evidently added simply to bring the case within the jurisdiction of the county of King, under the statute, Bal. Code, § 6791 (P. C. § 2014), which is as follows:

"When property taken in one county by burglary, robbery, larceny, or embezzlement has been brought into another county, the jurisdiction is in either county."

It is the contention of the appellant that this statute is unconstitutional by reason of its being obnoxious to § 22, of article 1, of the constitution of the state of Washington, which is as follows:

"In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed."

In this case the offense was alleged to have been committed in San Juan county, and the appellant was deprived of the constitutional guaranty that he should have a trial by an impartial jury of the county in which the offense was alleged to have been committed. It is true that, in cases of larceny, courts have generally held that the defendant could be tried either in the county where the offense was committed or in the county to which the goods had been removed. But this is upon the theory that each asportation of the stolen property constitutes a new theft, thereby making the crime a continuing crime. The rule is thus announced in a note to 9 Am. & Eng. Ann. Cases, p. 615:

"In the absence of any provision in the constitution of the state that an offender is entitled to be indicted and tried in the county in which the offense has been committed, it has been held, as in the reported case, that it is competent for the legislature to enact a law providing that an offender may be prosecuted, in the first instance, in a county other than the one in which the offense has been committed. . . . But where the constitution of the state provides that the accused in a criminal case is entitled to a trial by an impartial jury of the county in which the offense has been committed, it has generally been held that a statute giving jurisdiction of a prosecution to the courts of a county other than that in which the offense has been committed is void as denying to the offender the constitutional right of a trial in his county or vicinage."

In 12 Cyc. 234, it is said:

"The offense of burglary is committed in the county where the party breaks and enters, and, where the constitution guarantees to the accused a trial in the county where the offense was committed, the legislature cannot authorize prosecution for burglary in a county in which it was not committed, but into which the accused may have carried property stolen at the time of the burglary."

In *State v. McGraw*, 87 Mo. 161, under a constitutional provision similar to ours, it was held that the general assembly could not, under the constitution, authorize a prosecu-

tion for burglary in a county other than the one in which the crime was committed.

By reason of the conclusion we have reached on this assignment, it is not necessary to discuss the other assignments set forth in the brief. The judgment will be reversed, with instructions to sustain the demurrer to the information.

RUDKIN, C. J., PARKER, MOUNT, and CROW, JJ., concur.

[No. 8034. Department Two. November 9, 1909.]

GEORGE McKAY, *Respondent*, v. J. M. E. ATKINSON & COMPANY *et al.*, *Appellants*.[1]

ATTORNEY AND CLIENT—COMPENSATION—EVIDENCE OF EMPLOYMENT—SUFFICIENCY. Findings to the effect that an attorney was employed by a corporation, or at least that the corporation ratified the employment, are sustained where it appears that the officers had conversations with the attorney about the suits, in which it was interested, directed action to be taken therein, and upon request paid part of the attorney's bills.

Appeal from a judgment of the superior court for King county, Griffin, J., entered December 22, 1908, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Sullivan & Stevens, for appellants.

Thomas B. MacMahon, for respondent.

DUNBAR, J.—This action was instituted in the superior court of King county, for the purpose of recovering attorney's fees for alleged services in such capacity. It is not necessary to repeat the allegations of the complaint. The substance is that legal services had been rendered by the plaintiff, amounting to the sum of $580, and that there was a balance due of $320. The defendants Atkinson & Company and

[1]Reported in 104 Pac. 806.

H. H. Eaton denied all allegations of the complaint, except the payment of the $260. The cause was tried to the court, and judgment was rendered in favor of the plaintiff for the sum of $320, the amount demanded in the complaint. The court found that, on or about the 1st day of February, 1908, the defendants J. M. E. Atkinson & Company and H. H. Eaton retained and employed the plaintiff as an attorney at law to try certain lawsuits mentioned in the findings; that the plaintiff tried the causes; found the reasonable value of said services, and entered a judgment for $320; as a conclusion of law, found that the plaintiff was entitled to the sum of $320, and judgment was rendered therefor.

There is no question as to the amount charged for the services rendered, it being admitted in appellants' brief that the respondent rendered the services alleged in his complaint, and that the only question was, for whom the services were performed, the contention of the appellants being that, if the respondent was employed at all, he was employed by H. H. Eaton as an individual, and that the corporation J. M. E. Atkinson & Company did not employ him, did not ratify the employment, and is in no way responsible for the services rendered.

There is a plain conflict of testimony in this case between the witness Eaton and the respondent George McKay. The court found the facts in favor of McKay, and from an examination of the record we are not prepared to say that the findings were not warranted. The respondent testified that he had had conversations in relation to these several employments with both Mr. Eaton and Mr. Atkinson, the president of the corporation; that Mr. Eaton informed him that he had arrangements with Atkinson whereby Atkinson was to furnish the money and he and Atkinson were to divide the net profits; that in the Gould cases Gould was merely trustee for Atkinson, and that Mr. Eaton held the title in trust for them. So that, if this statement is true—and the court evidently believed it was, notwithstanding the denial on the part of Eaton

and Atkinson—the corporation was interested in the legal proceedings. The respondent testified that Eaton told him to go over and see Atkinson about the necessity of his going to the supreme court in one of the cases; that he did go over and talked with Atkinson, and that Atkinson told him if it was necessary to go, and that he did go on with the case after such conversation; that he had talked with Mr. Roberts, a member of the corporation and its secretary-treasurer; that Roberts represented himself as the agent of the corporation in that particular transaction; that he had written a letter addressed to J. M. E. Atkinson & Company, asking for the payment of $100 on account, and the letter stated the title to the case in which he had rendered the service; that the order was approved by Mr. Eaton, he writing his O. K. on the margin of it; that after waiting a few days and not hearing anything from it, he went down to the office of Atkinson & Company and, when he got to the office, the check was there ready for him, signed "J. M. E. Atkinson & Company," together with a letter handed to him. The letter was as follows:

"We have for acknowledgment your favor of April 2nd and as requested therein take pleasure in handing you herewith our check for $100 on account of your service in case of Gould vs. Knox, Gould vs. White, Gould vs. Stanton, and Gould vs. Austin. Kindly acknowledge receipt, and oblige,

"Yours very truly,

"J. M. E. Atkinson & Co.;"

that this letter was written on stationery of J. M. E. Atkinson & Company; that he had two or three conversations with Mr. Atkinson after that in relation to the business; that on another occasion he received another check signed "J. M. E. Atkinson & Company," and that this check was handed to him by Mr. Atkinson himself; that finally Atkinson refused to pay any more bills unless they were O. K.'d by Eaton, and that Eaton refused to O. K. them.

Mr. Eaton denied many of these statements alleged to have been made by him, and denied responsibility for the employ-

ment, but would not deny that he was in the respondent's office at the time the first letter was written to the corporation by the respondent, simply contenting himself with saying that he "could not say"; but admitted that he O. K.'d a demand or request for payment of that money by the respondent, and when asked if he did not know that that request was addressed to J. M. E. Atkinson & Company, he replied: "It may have been; I could not say," and made the same reply to the question propounded to him in relation to the second request for $100 addressed to J. M. E. Atkinson & Company; admitting also that he O. K.'d that order or request, knowing that it was addressed to the corporation.

There is no dispute that the respondent had the conversation with Roberts that he claims to have had, in relation to this employment. Atkinson admits that he tore open the letter that was addressed to him, in relation to this fee, and sat there and talked about the cases with the respondent, and that the letter was addressed to J. M. E. Atkinson & Company. Considering the relationship which undoubtedly existed between Eaton and the corporation, the action of Atkinson, the president of the corporation, in paying these demands, and the conversation he had with the respondent in regard to them, and the undisputed statement of the respondent in relation to the conversation that he had concerning this employment with Roberts, the secretary-treasurer of the corporation, we think the court rightly concluded that the corporation was a party interested in these lawsuits, and that it employed or at least ratified the employment of the respondent, and that it cannot now escape responsibility in that regard. The counsel cites 21 Am. & Eng. Ency. Law (2d ed.), p. 858, to the effect that "the powers of the president [of a corporation] as such, extends only to matters arising in the ordinary course of the company's business, and contracts made by him as to other matters are not binding on the corporation although made in its behalf." This, no doubt, is the general rule, but the next citation from the

same author, at page 859, viz: "In the nature of the case, no precise rules can be laid down as to the power of the president in respect to particular transactions, for this will be determined largely by the nature of the company's business and the other circumstances of the case," is applicable here.

Applying this principle of the law to the facts shown by the testimony, we think the judgment of the court was right, and it will, therefore, be affirmed.

RUDKIN, C. J., CROW, MOUNT, and PARKER, JJ., concur.

[No. 8329. Department One. November 10, 1909.]

JOHN JEMO *et al.*, *Respondents*, v. TOURIST HOTEL COMPANY, *Appellant*.[1]

APPEAL—NOTICE—TIME FOR TAKING. Where judgment was rendered February 3, and filed the next day, a notice of appeal and appeal bond served and filed May 3, is within the ninety days provided by Bal. Code, § 6502.

SAME—WHEN TIME BEGINS TO RUN—ENTRY OF JUDGMENT—NEW TRIAL. Where, after a judgment on a verdict, a motion for a new trial is denied and a new judgment entered on motion of the successful party, he is estopped to deny that the latter is the final judgment, and it vacates the former, and time for taking an appeal begins to run from that time.

LANDLORD AND TENANT—LEASE — APPURTENANCE — IMPLIED EASEMENT—SIDE ENTRANCE. Where a lease of a room for a restaurant, in a hotel building, which had a front entrance on the street, and a side entrance into the lobby of the hotel which was a convenience but not necessary to the beneficial use of the property, the side entrance is not an appurtenance and there is no implied easement rendering the landlord liable in damages for closing the same.

DAMAGES — TO LEASED PREMISES — APPROXIMATION — EVIDENCE—SUFFICIENCY. Damages need not be shown with precision and accuracy, and a verdict for $250 for damages to leased premises, by reason of negligence of the landlord in repairing a building, is not unsupported or based on conjecture, where the walls were injured and the place of business closed while tenants made repairs, at an expense estimated by them at five or six hundred dollars.

[1]Reported in 104 Pac. 820.

Appeal from a judgment of the superior court for King county, Albertson, J., entered February 4, 1909, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for damages. Modified.

Hughes, McMicken, Dovell & Ramsey, for appellant.
John E. Ryan and *C. K. Poe*, for respondents.

Gose, J.—The appellant owns and conducts the Tourist hotel, situate on the corner of Occidental avenue and Main street, in the city of Seattle, and fronting on Occidental avenue. On April 1, 1905, its predecessors in title leased to respondents, for the term of three years, a room to be used as a restaurant, on the ground floor of the hotel building, adjoining the rotunda of the hotel and connected therewith by a doorway, and fronting and having its entrance on Main street. It was described in the lease as "the room situated on the ground floor of 156 Main street." The respondents entered into the possession of the leased premises and began and continued to conduct a restaurant therein, with the slight interruption hereafter noticed, until the expiration of the lease.

In November, 1906, the appellant closed the doorway between the hotel rotunda and the restaurant. After the expiration of the lease, the respondents commenced this action, seeking to recover damages on two counts. The first cause of action is predicated on the loss of patronage arising from the closing of the door between the hotel rotunda and the restaurant. The second cause of action proceeds from certain alleged injuries to the interior of the restaurant, caused by the appellant in repairing and changing the hotel building. The appellant demurred to the first cause of action, upon the ground that it does not state facts sufficient to constitute a cause of action. The demurrer being overruled, issue was joined and the cause tried to a jury, resulting in a verdict for respondents on both causes of action, upon which a judgment was entered, from which this appeal was taken.

At the close of the case, the appellant moved the court to instruct the jury that there could be no recovery.

The respondents have moved to dismiss the appeal, because the appeal bond was not given or filed within five days after the service and filing of the notice of appeal, nor within ninety days after the motion for a new trial was denied. The record shows that the verdict was filed January 13, 1909; that a motion for a new trial was filed January 15, denied January 30, and a judgment rendered upon the verdict on the motion of the respondents February 3, and filed February 4. The notice of appeal and the appeal and supersedeas bond were served and filed May 3. Upon the record this appeal was taken within the ninety days provided by law. Bal. Code, § 6502 (P. C. § 1050). However, the respondents assert that the clerk at once entered a judgment as provided by law (Laws 1903, p. 285, § 1); that on February 9 the notice of appeal was filed and a defective bond filed the following day; that the second notice of appeal and the appeal bond were served and filed more than ninety days after the denial of the motion for a new trial, but within ninety days after filing the last judgment. We will assume the record to be as the respondents state, and the question then presented by the motion is, whether the time for taking an appeal commenced to run on January 30 when the motion was denied, or on February 4 when the last judgment was entered. If the appeal was from the judgment entered by the clerk, then it should be dismissed for two reasons: (1) Because not taken within ninety days from the denial of the motion; (2) because the notice of appeal states that it is taken from the judgment entered February 4.

We have seen that the last judgment recites that it was rendered on the motion of the respondents. In *Herzog v. Palatine Ins. Co.*, 36 Wash. 611, 79 Pac. 287, we held that, when the respondent caused the later judgment to be entered, he estopped himself from asserting that it was not the final appealable one. However, the respondents

assert that a different view was taken in the later case of *Chilcott v. Globe Nav. Co.*, 49 Wash. 302, 95 Pac. 264. In this case the clerk entered a judgment on the day the verdict was returned. Thereafter a motion for a new trial was denied. One month later a judgment was entered at the instance of the losing party. We held that the defeated party could not extend the time for taking an appeal by having a subsequent judgment entered. It was not the intention of the court to modify the rule announced in the *Herzog* case, as is shown by the reasons stated in the opinion and the fact that the case was not referred to. We think that, where a judgment has been entered by the clerk and later a motion for a new trial made and denied and a new judgment entered by the court upon the motion of the successful party, he is not only estopped to deny that it is the final judgment, but that in effect it vacates and supersedes the former judgment. The motion is therefore denied.

Upon the first cause of action, we find that the lease did not in terms include the right to use the door between the rotunda of the hotel and the restaurant. If the right exists at all, it arises by necessary implication. We have seen that the restaurant fronted, and had its entrance, on Main street. A right of way by implication arises only from necessity and never from convenience. If it exists in the instant case, it must rest upon the fact that the doorway was necessary to the beneficial use and enjoyment of the demised premises. It is urged that the closing of the door lost the respondents a considerable patronage which had theretofore passed from the lobby of the hotel into the restaurant, furnishing a substantial part of respondents' business, and that appellant is liable in damages for this loss. Stated in the fewest words, the contention means that the respondents had a right of way through the door, into and through the lobby of the hotel, and through its main entrance as well, as an easement appurtenant to the restaurant, and that the appellant was required to maintain and operate the hotel as a hotel during

the life of the lease. The full effect of the respondents' position is that the hotel was a servient estate, and that the appellant owed them an implied duty to carry on a hotel business so as to furnish them customers, without regard to the effect upon it or its property, for the loss alleged was that they no longer received the patronage of the guests of the hotel.

It would seem that the bare statement of the contention demonstrates its fallacy. If the appellant is liable in damages for closing the door in question, it would have been liable if it had closed the front door. That the doorway was a convenience to respondents none will deny, but it was not necessary to the beneficial enjoyment of the property, and was therefore not an appurtenance. While not stated in direct terms in any of the cases, the doctrine of an implied easement is founded on the intention of the parties, not expressed, but to be gathered from all the surrounding circumstances. If the right claimed is necessary to the enjoyment of the property as contradistinguished from beneficial, it will be implied. Applying this principle to the case at bar, it becomes clear that the landlord did not intend to make the hotel servient to the restaurant. Cases may arise in which the question of an appurtenance is one of mixed law and fact, but in this case it is clearly one of law. The respondents urge that the court would have been justified, as a matter of law, in instructing the jury that the doorway was necessary to the beneficial use of the property, and that therefore it was included in the lease as an appurtenance to the restaurant. We agree with them that the determination of the question was one of law, but disagree with them as to the further part of their contention. Our view is supported by the following cases: *Ward v. Robertson*, 77 Iowa 159, 41 N. W. 603; *Walker v. Clifford*, 128 Ala. 67, 29 South. 588; *Cummings v. Perry*, 169 Mass. 150, 47 N. E. 618, 38 L. R. A. 149; *Gale v. Heckman*, 16 Misc. Rep. 376, 38 N. Y. Supp. 85; *Patterson v. Graham*, 140 Ill. 531, 30 N. E. 460; *Oliver*

v. Dickinson, 100 Mass. 114; *Hill v. Shultz*, 40 N. J. Eq. 164; *Barrett v. Bell*, 82 Mo. 110, 52 Am. Rep. 361; *Howell v. M'Coy*, 3 Rawle 255; *In re Mayor of New York*, 83 App. Div. 513, 82 N. Y. Supp. 417.

In the *Walker* case, the owner of certain property leased to another a part of it, known as the Florence Hotel building, including the hotel rotunda therein, for occupancy as a hotel, excepting therefrom certain stores in the building. Prior to the lease, he had leased to another certain portions of the building, including the saloon and billiard hall, agreeing that all doors between the hotel and the last described property should be kept open for the use of the latter lessee. The hotel building was built especially for hotel purposes, and the saloon and billiard hall were accessible from the hotel rotunda by means of doors. A door opened from the saloon to the street, and the billiard hall could only be reached by passing through the saloon or the hotel corridor, and only through the latter when the former was closed. The lessee of the saloon and the billiard hall asserted that the lessee of the hotel took the lease with knowledge of such facts and subject to an easement, and sought to enjoin the latter from closing the doors leading from the rotunda into the billiard hall. A temporary injunction was granted, and later was dissolved on the ground that no easement or right of way had been reserved by implication or otherwise. On appeal the decree was affirmed, on the ground that the facts did not disclose an implied easement. The court said that the saloon and billiard hall were easily accessible from the street, and that the way claimed was not a way of necessity but merely of convenience, and that an implied easement could only arise from necessity.

In the *Ward* case, certain wholesale druggists had leased the north part of a block fronting on a street in which to carry on their business. The lessor owned the entire block, the south side of which was bounded by another street, upon which there was a line of railroad and which had been leased

to another. The lessees of the north rooms claimed a right of way through the south room to the railroad street, for the purpose of unloading freight and carrying it through the south room, thence through a doorway leading to their place of business, as an easement appurtenant to the use of their property. The court held that the right claimed was only a convenience, and not necessary to the beneficial use and enjoyment of their property, and that it could not arise by implication.

In the *Gale* case, the plaintiff had let to the defendant an apartment on the second story of a building, known as the Hotel San Remo. At the time the lease was made, the lessor carried on a restaurant in the same building with the demised apartment, but the lease was silent as to the restaurant. The lessee vacated and refused to pay rent, because the restaurant had deteriorated in appointments, management, and purveyance. Upon the trial, evidence tending to show the existence of the restaurant and its deterioration was admitted. Upon appeal it was held that the evidence was incompetent and irrelevant, and the judgment was reversed.

The respondents cite and rely upon *Lindbloom v. Berkman*, 43 Wash. 356, 86 Pac. 567; *Snow v. Pulitzer*, 142 N. Y. 263, 36 N. E. 1059, and *Kitchen Bros. Hotel Co. v. Philbin* (Neb.), 96 N. W. 487. In the *Lindbloom* case, the appellants leased to the respondents the second, third, and fourth floors of a building located at the corner of Occidental avenue and Washington street in the city of Seattle, to be used as a hotel and rooming house, reserving the right in the lessors to change, alter, or repair the stairway leading to the leased premises on Occidental avenue. The only entrance to the leased premises was one from Occidental avenue through a large and attractive hall to the elevator. At the time of the execution of the lease the hall was unoccupied, but thereafter the appellants let a part of the hallway to a huckster who, over the objection of the respondents, entered therein with his wares and greatly impeded the ingress and

egress to and from the leased premises. Later they changed the stairway, moving it from near the center of the hallway to one side, and from time to time thereafter leased the space thus made to hucksters and dealers in cheap wares, and left them in possession until forbidden by an injunctive order of the trial court. This court held that, while the hall was not a part of the second, third and fourth floors, it was the only means of going to and from them, and that it passed as an appurtenance to the property leased.

In the *Snow* case, a party erected a seven-story building in the city of New York. Subsequently another person erected an adjoining four-story building, and still later another owner erected another adjoining building; thus making three buildings in one block, each having independent walls. Subsequently the first builder acquired the three properties and converted them into a hotel called French's hotel, the three being used together as one building. Thereafter the owner of the entire property leased the first story of the four-story building, and then conveyed the entire property, describing it as French's hotel, subject to the lease. Thereafter the owner tore down the four upper stories in the seven-story building, when it was found that the wall of the four-story building was supported by the adjoining wall of the seven-story building, and that it could not stand without such support, and it began to crack and break and there was imminent danger of its falling. Upon discovering this fact the owner discontinued the work. Thereafter the four-story building was condemned by the city, torn down, and the tenant was deprived of the benefit of his lease and ousted from the property. In an action for damages the owner contended that the tenant was not entitled to have the building in which his store was situated supported by the adjoining wall of the seven-story building; that there was no easement in that wall for the support of the wall of the four-story building. It was held that, if the wall of the four-story building could not stand of itself, then

the tenant was entitled to the support of the wall of the seven-story building; that the two walls constituted the wall of the leased building, and that the owner had no right to remove the support so as to drive the tenant from his store; that he had no more right to remove the supporting wall than he would have to tear down the demised building or remove its roof.

These cases do not, in our opinion, support the respondent's contention. In the *Kitchen Bros. Hotel Co.* case it was held that, where the owner of a hotel leased a storeroom upon the ground floor of the hotel building to be used as a ticket broker's office, the room fronting upon and having a front door opening on a street, and also a back door opening into a hall leading to the hotel rotunda, the closing of the latter door by the lessor was a breach of the implied covenant for quiet enjoyment, and rendered him liable in damages. We cannot yield our assent to the view announced in this case, and it is not in harmony with the other authorities to which reference has been made. We think the court overlooked the vital distinction between a necessity and a convenience. As was said in *Hill v. Schultz*, 40 N. J. Eq. 164:

"Since the parties did not adjudge it important enough to contract respecting the use of this platform in plain terms, is the necessity so strong as to make the demands appear reasonable?"

We think not. The guests of the hotel could, by passing through the main hotel entrance into Occidental avenue and around the corner a few steps, enter the respondent's restaurant. The first cause of action must therefore fail.

Passing to a consideration of the second cause of action, we find that the respondents' evidence tended to show that the appellant, in repairing the hotel, tore up the floors, tore the paper on the ceiling and the walls, and broke the plastering of the restaurant to such an extent that it became necessary for them to close the restaurant for a period of about seventeen days, and repair the interior at an expense of five or six hundred dollars. The respondents did not produce

any of the bills pertaining to the repairing, but estimate the expenses as stated. The verdict was for $250 on this cause of action. The appellant urges that the verdict was based on speculation and conjecture, and that there is no substantial evidence to support it. "Damages," briefly defined, means compensation for the legal injury. It is a word easy to define, but often exceedingly difficult of application. Whilst it is true that a verdict for damages must not rest upon speculation or conjecture, it is likewise true that damages need not be shown with precision and accuracy, but approximately. *Kruegel v. Kitchen*, 33 Wash. 214, 74 Pac. 373. The testimony of the respondents makes it reasonably certain that the walls and floor of the restaurant were damaged by the negligence of the appellant, and it will not be permitted to escape liability because the amount of the damage or the cost of the repairs cannot be stated with exactness. It suffices if the loss sustained can be reasonably estimated from known or approved data. The respondents repaired the entire floor and walls at an expense of about $1,100. They estimated that about one-half of this expense was required on account of the acts of the appellant. Had they produced the bills they would only have shown the expense as an entirety. The part for which the appellant should compensate them would still be provable only by estimate and comparison. The accounts have been lost. Not taking into account the damages claimed for loss of profit on the business, which has no basis in the evidence stronger than conjecture, we think there is sufficient evidence in the record to support the verdict on the second cause of action.

The judgment will be modified, and the cause remanded with directions to the trial court to enter a judgment for the respondents for $250, with interest from the date of such judgment. The appellant will recover its costs.

Rudkin, C. J., Chadwick, and Fullerton, JJ., concur.

Morris, J., took no part.

[No. 8109. Department Two. November 12, 1909.]

NANCY J. HEMBREE, *Appellant* v. WILLIAM MCFARLAND *et al., Respondents.*[1]

TAXATION — FORECLOSURE — SUMMONS FOR PUBLICATION — SUFFICIENCY. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default.

TAXATION—FORECLOSURE AND SALE—SETTING ASIDE—LACHES. A nonresident who failed to pay taxes for six years is not estopped by laches from bringing action to set aside a void tax foreclosure, where there were no material changes in the value of the property, and she did not know, until about a year prior to action, of the attempted foreclosure or possession by the defendant.

TAXATION—JUDGMENT—DIRECT ATTACK. An action to recover possession of lands sold for taxes and to set aside the tax judgment is a direct and not a collateral attack upon the tax foreclosure.

JUDGMENT — RECITALS — EVIDENCE TO OVERCOME PRESUMPTION OF JURISDICTION. Proof that defendants did not appear, were not personally served, and a record showing nothing but the publication of summons void on its face, is sufficient to overcome the presumption from recitals in the judgment of due service, and shifts the burden of proof, in a direct attack on the judgment; as the same is only a *prima facie* presumption.

Appeal from a judgment of the superior court for King county, Morris, J., entered December 19, 1908, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to quiet title. Reversed.

L. H. Wheeler, for appellant.

Bausman & Kelleher, for respondents.

MOUNT, J.—The appellant brought this action to recover possession of a certain lot of land, and to set aside a judgment and to remove the cloud thereof from the plaintiff's title. The trial court concluded that the plaintiff was

[1]Reported in 104 Pac. 837.

guilty of laches, and was therefore estopped to claim the land, and entered a decree dismissing the plaintiff's complaint, and quieting title in the respondents. The plaintiff has appealed.

The facts are not disputed. It appears that the appellant is a nonresident of the state. In the year 1895 she acquired the lot in question and an adjoining lot in the city of Seattle. She paid no taxes on the lot in question. In the year 1900, the county treasurer issued to respondent Hannah McFarland a certificate of delinquency for taxes delinquent on the property for the years 1895-6. On February 14, 1901 Hannah McFarland brought an action to foreclose her certificate of delinquency. The only service attempted was by publication. This service was void. No appearance in the case was made by the defendants. Thereafter a default decree of foreclosure was entered. This decree recited that the notice and summons "was regularly and duly served." Thereafter, in July, 1901, the property was sold under the decree of foreclosure, and was bid in by the plaintiff in that action. A treasurer's deed was subsequently issued to her, and she immediately took possession of the property, and after September, 1903, made improvements on the property to the value of $2,100. The lot in question, at the time this action was begun, was of the value of $1,100. At the time of the foreclosure the lot was of the value of about $100. Prior to bringing the action, the appellant tendered to respondents all taxes and interest paid by them. She did not know of the foreclosure or that the respondents had possession of her lot, until the year 1906. She brought this action in September, 1907.

It is conclusively shown in the case that the court had no jurisdiction to enter the decree in the tax foreclosure case. This court has repeatedly held that summons like the one here served is void and confers no jurisdiction upon the court to render judgment. *Gould v. White*, 54 Wash. 394, 103 Pac. 460. This point seems to be conceded. The trial

court was of the opinion, however, that the appellant was guilty of laches, and for that reason could not maintain the action. This ruling was based upon the decision in the case of *Stevens v. Doohen*, 50 Wash. 145, 96 Pac. 1032. In that case we said:

"There are facts in the record which tend strongly to show laches on the part of the appellants, but we shall not consider these facts because we prefer to rest the decision of this case upon the validity of the judgment in the tax foreclosure proceeding."

The opinion shows that the value, the title, and the conditions of the property had materially changed. It is not stated what notice the appellants in that case had of such changes, but it is fair to presume, in view of the fact that they were residents of the state, that they stood by for several years and knew of these changes; while in the case at bar the appellant did not know that there was any attempted foreclosure or sale of her property until about one year prior to the time she brought this action. After she learned this fact, no material change in the value, title, or conditions of the property is shown to have taken place. We think, therefore, this case is not controlled by that case, and also that there is no laches shown except the mere failure to pay taxes, which, under the rule stated in *Gould v. White, supra*, is not sufficient.

It is argued by respondents that the judgment of the lower court should be affirmed upon two grounds, besides the one upon which the court rested the decision; viz., (1) because this is a collateral attack upon the tax judgment, and (2) because the evidence is insufficient to overcome the presumption of jurisdiction arising from the recitals in the tax judgment. We have held that an action identical with this in all respects was a direct attack in equity upon the foreclosure judgment. *Silverstone v. Totten*, 50 Wash. 447, 97 Pac. 491.

In *Gould v. White, supra,* which was a case like this, we said:

"In this case the appellants proved that the defendants in the tax forclosure proceedings did not appear, and were not personally served with process, and produced a record showing nothing beyond the publication of a void summons. This, in our opinion, made out a *prima facie* case in their behalf; the presumption in favor of jurisdiction was overcome, and the burden of proof shifted to the respondents to show that a valid service of process was made."

And in *Holly v. Munro, ante* p. 311, 104 Pac. 508, we said:

"But, in any event, the recital of jurisdiction is only *prima facie* evidence."

These decisions are based upon the theory that the attack was direct upon the tax foreclosure judgment. In *Wick v. Rea,* 54 Wash. 424, 103 Pac. 462, Department One of this court said:

"The rule is, and it has been frequently declared by this court, that where the court has jurisdiction of the subject-matter of an action and the judgment recites due service, when there is nothing in the record to contradict the recitals of the judgment, it cannot be collaterally attacked. Under this rule the evidence upon which the court based its finding need not appear affirmatively in the record. It is enough if the contrary does not appear. [Citing authorities.] The converse of this rule follows, and is sustained by the same authorities. So that, although the judgment recites jurisdiction, if a want of jurisdiction affirmatively appears upon the face of the whole record, the judgment will be held to be void upon collateral as well as direct attack."

The recital of due service in this case is disputed by the record itself, and such service was therefore merely *prima facie* and might be overcome by proof to the contrary. *Gould v. Stanton,* 54 Wash. 363, 103 Pac. 459. Such proof appears in this case. In fact, it is not disputed that the summons of record is void upon its face, and that no other service was made, or attempted to be made, and no personal

appearance was made by the defendants in that action. The tax foreclosure judgment was therefore void, and should have been set aside. The judgment appealed from is reversed, and the cause remanded with directions to enter a judgment setting aside the tax foreclosure proceedings and requiring the appellant to pay to respondents the taxes paid by them, together with interest; and also to pay the value of the improvements as hereinbefore stated, in accordance with the provisions of chapter 137, Laws 1903, page 262.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

[No. 8151. Department Two. November 12, 1909.]

DR. JOHN DUNLAP, *Appellant*, v. JOHN C. SUNDBERG *et al.*, *Respondents*.[1]

LIBEL AND SLANDER—PERSON REFERRED TO—PLEADING—COMPLAINT—SUFFICIENCY. A complaint in an action for libel fails to show that it was published of and concerning the plaintiff, a reputable and duly licensed physician, where the complaint alleges that the defendants, as physicians in an office building, signed and published a petition to the owners of the building reciting that they, as reputable physicians, desiring to uphold the honor of their profession, demanded the removal from the building of osteopaths . . . . criminal practitioners, medical institutes, advertising specialists, patent medicine fakirs, quacks, charlatans and other fraudulent concerns, and demanded the removal of all such persons and undesirable tenants, although the complaint further alleges that defendant intended thereby to refer to the plaintiff, who was not mentioned in the petition, and whom the complaint alleges to be a reputable and duly licensed physician.

SAME. Bal. Code, § 4938, providing that in libel it is not necessary to state in the complaint any extrinsic facts to show the application of the libel to the plaintiff, but it shall be sufficient to state such fact generally, does not obviate the necessity of pleading that the publication was so understood by persons seeing it; and a complaint is insufficient, although it contains such general allegation, where it negatives the fact that plaintiff was referred to in the defamatory matter.

[1]Reported in 104 Pac. 830.

Appeal from a judgment of the superior court for King county, Neterer, J., entered February 8, 1909, upon sustaining demurrers to the complaint, dismissing an action for libel. Affirmed.

Edgar S. Hadley, for appellant.

McBurney & Cummings, for respondents.

Crow, J.—Action for libel, commenced by Dr. John Dunlap, plaintiff, against John C. Sundberg and twenty-four other defendants. General demurrers interposed by the defendants were sustained; whereupon the plaintiff elected to stand upon his complaint, and has appealed from an order of dismissal.

This action involves the same petition which was published and of which complaint was made in *Lathrop v. Sundberg*, *ante* p. 144, 104 Pac. 176, reading as follows:

"We, the following reputable physicians and dentists, occupying offices in the Eitel Building, endeavoring to uphold the honor and dignity of our professions and desiring to encourage only the best and most desirable tenants for our office building, and thereby conserve the best interests of the public at large, are most emphatically opposed to the indiscriminate rental of offices in this building to osteopaths, neuropaths, autopaths, chiropractors, uptomtereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakers, quacks, charlatans, and other fraudulent concerns. We therefore demand the removal of all such persons now holding offices in this building and the exclusion therefrom of all such undesirable tenants in the future."

The appellant alleged that, on March 16, 1908, the respondents, with intent to harass and humiliate him, caused to be published in the Seattle Times, and circulated, the above mentioned petition of and concerning him in his business and professional capacity; that at the time of its publication and circulation, he was and now is a duly licensed physician, an alumnus of Princeton, Yale, Baltimore and New York

universities; that he holds licenses to practice medicine from the states of Montana, Illinois, and Washington; that he has been a practitioner in each of those states, and that as a further preparation for the practice of his profession, he has studied abroad in the hospitals of Europe. He further alleges:

"That at the time of the circulation and publishing of said libel the plaintiff was, as aforesaid, practicing his profession as a physician and surgeon in the Eitel building, and the defendants and each of them, when publishing and circulating said petition, intended to and did charge the plaintiff with being a quack and a charlatan in his business and profession, and charged the plaintiff with being an illegitimate practitioner, and in his business and professional capacity violating the laws of the state of Washington, and perpetrating frauds upon the public; and they further designated this plaintiff as being an undesirable tenant for said building and that his business and his manner of carrying on the same reflected upon the reputation of the building in which the plaintiff and the defendants were situated, and brought disgrace and shame upon the defendants who deemed themselves as reputable physicians."

The appellant's name was not mentioned in the petition or publication. If the complaint is sufficient to show that the words were in fact written and published of and concerning him, the demurrer should have been overruled. *Lathrop v. Sundberg, supra.* The respondents, however, contend that the complaint does not state a cause of action, for the reason that its allegations fail to show that the words were published of or concerning appellant in any capacity whatever, or that they were so understood by any third person. The article protested against the indiscriminate renting of offices in the Eitel building to persons therein designated and classified as "osteopaths, neuropaths, autopaths, chiropractors, umtomtereists, unprofessional masseurs, criminal practitioners, 'medical institutes,' advertising 'specialists,' patent medicine fakers, quacks, charlatans, and other fraudulent concerns." But reputable physicians are not complained of or

mentioned. Giving the complaint a most liberal construction, we fail to find any allegation that includes the appellant in any one of the classes that are enumerated. On the contrary, the complaint alleges, and the demurrer admits, that he is an educated and licensed physician, practicing his profession in the Eitel building. The petitioners made no complaint of any such person. In the *Lathrop* case it was alledged that the plaintiff was an osteopath, practicing his profession in the building. Osteopaths were specifically mentioned in the petition, and this court held that it classed the plaintiff with criminal practitioners, patent medicine fakers, quacks, charlatans, etc.; that the words were actionable *per se*, and that the complaint stated a cause of action. The petition does not, by the most remote suggestion, so classify any reputable physician such as the appellant alleges himself to be, and we fail to see how he has been injured or can complain. He cannot expect this court to assume that he is one of the unnamed persons designated in the petition and was, therefore, classified as a criminal practitioner, advertising specialist, patent medicine faker, quack, or charlatan, ignoring his positive allegation that he is an educated, reputable, and licensed physician, honorably practicing his profession in the Eitel building. On the contrary, it may be readily inferred from the complaint that he, as a tenant in the Eitel building, was unobjectionable to other reputable practitioners and tenants.

The appellant attempts to avoid the defects of his complaint by calling attention to his allegation that the words were published of and concerning him, citing Bal. Code, §4938 (P. C. §409), which reads as follows:

"In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted,

the plaintiff shall be bound to establish on trial that it was so published or spoken."

In order that the appellant may maintain an action on the alleged libelous publication, it must appear not only that it was written of and concerning him, but also that it was so understood by some third person who read or heard the words. The complaint contains no allegation that the article was understood by any third person to be libelous or defamatory of him.

In *De Witt v. Wright*, 57 Cal. 576, the court said:

"By §400 of the Code of Civil Procedure, it is rendered unnecessary to state in the complaint any extrinsic facts for the purpose of showing the *application to the plaintiff* of the defamatory matter, but it is sufficient to state, generally, that the same was published or spoken *concerning* plaintiff; but this section, in our opinion, does not do away with the necessity of the averment that the person or persons who read the writing or heard the words *knew* the plaintiff was meant. Without such knowledge, as already observed, there could be no cause of action."

The affirmative allegations of the complaint, to the effect that the appellant is a reputable physician, negative the general statutory allegation that the words were spoken of and concerning him. Section 535 of the New York Code is, in substance, the same as § 4938, *supra;* but the court of appeals of New York, in *Fleischmann v. Bennett*, 87 N. Y. 231, held that merely alleging the application of the article to plaintiff, in the language of the statute, will not save the complaint from successful attack by demurrer, when such allegation is rendered nugatory by other affirmative allegations, showing that the article could not have possibly referred to him. *Corr v. Sun Printing & Publishing Assn.*, 177 N. Y. 131, 69 N. E. 288; *Fagan v. New York Evening Journal Pub. Co.*, 129 App. Div. 28, 113 N. Y. Supp. 62.

The petition here pleaded does not name the plaintiff as one of the persons of whom it complains, nor is it aimed at

any tenant engaged in the practice of his profession as a reputable physician. The appellant does not aver that he was engaged in any one of the occupations designated as objectionable, as did the plaintiff in *Lathrop v. Sundberg* when he alleged himself to be an osteopath. There must have been something in the petition itself which referred to the appellant individually, or included him as one of the particular group of individuals therein mentioned and libeled, or it must have contained descriptive statements with which he can identify himself by proof, to show that the words were written of and concerning him, or he must be so identified with the situation or subject-matter mentioned in the petition that, upon showing his relation to them, it may be fairly inferred that the article was directed against him. Appellant's allegation that he is a reputable physician, which is admitted by the demurrer, expressly excludes him from any one of the classes of alleged objectionable persons mentioned. He has, therefore, pleaded himself out of court, as there is nothing in the complaint to show that the article could, by any intendment, be applied to him, conceding him to be a reputable physician engaged in the practice of his profession as a tenant in the Eitel building.

The complaint fails to state a cause of action. The demurrer was properly sustained, and the judgment is affirmed.

RUDKIN, C. J., DUNBAR, MOUNT, and PARKER, JJ., concur.

[No. 8280. Department Two. November 12, 1909.]

Galena National Bank, *Appellant*, v. E. Ripley, *Respondent*.[1]

Appeal—Review—Denial of New Trial. The rule that the granting of a new trial for insufficiency of the evidence will not be reversed except for abuse of discretion, does not apply where the evidence necessarily and without conflict sustains the verdict.

New Trial—Newly Discovered Evidence—Cumulative. A new trial should not be granted for newly discovered evidence consisting of a letter that could not be found, where its loss and contents were proven at the trial, as the evidence would be only cumulative.

Bills and Notes—Consideration — Validity — Forbearance. A note given by a son, to cover a shortage of his deceased father, an officer in a bank, is not shown to be given for an unlawful consideration by the fact that it was desired to keep the defalcation quiet, where the bank forbore to make claim against the decedent's estate, since such forbearance constitutes a good consideration.

Appeal from an order of the superior court for King county, Albertson, J., entered May 28, 1909, granting defendant a new trial in an action on promissory notes. Reversed.

Chas. E. Congleton and *Milo A. Root*, for appellant.

Byers & Byers, for respondent.

Crow, J.—This action was commenced by the Galena National Bank, a corporation, against E. Ripley, to recover the amount claimed to be due on three promissory notes. On trial without a jury, the court ordered judgment in favor of the plaintiff. Thereupon the defendant filed a motion for a new trial, which was sustained, and the plaintiff has appealed from the order granting the new trial.

The complaint is in usual form, based upon three promissory notes executed by the respondent, who pleaded want of consideration. The evidence discloses the following facts: That respondent's father was for many years cashier of the

[1]Reported in 104 Pac. 807.

appellant bank at Galena, Illinois; that shortly after his death in 1893, the bank discovered that he had appropriated its funds to the amount of about $4,700; that it communicated this fact to his son, the respondent, then residing in Seattle, Washington; that the son expressed a desire that the defalcation be kept quiet, and on October 7, 1893, executed and delivered his notes to the bank therefor; that the respondent has since made renewals, the last renewal being the notes pleaded in the complaint, which were executed on February 14, 1905; that respondent has at different times made payments on the notes to the amount of about $250; that the appellant took the notes for the debt of the father, and refrained from pressing any claim against his estate, and that the deceased left an estate the amount of which was not shown, although the respondent alleged in his answer that his father left an estate, and offered to show on the trial that it was sufficient in amount to have paid the defalcation.

The appellant claims that, as a consideration for the notes, it agreed to, and did, forbear and refrain from making any claim against the estate or giving publicity to the defalcation, doing so at the respondent's request. The respondent in his evidence admits the execution of the notes and that he made the partial payments above mentioned, but insists that the notes were given without any valid consideration; that the appellant did not agree to release his father's estate, and that the notes were given for the accommodation of the appellant only, so that they might be used by it to satisfy the bank examiner who was about to examine and check up the bank. The respondent further testified that he was a single man when the original notes were given; that he has since married, and that the indebtedness, if valid, is his separate obligation. The trial judge announced his decision in favor of the appellant bank for the full amount of its claim, and adjudged the same to be the respondent's separate debt. Thereupon the respondent moved for a new trial on the following grounds: (1) newly discovered evidence, (2) in-

sufficiency of the evidence, and (3) error of law occurring at the trial.

In granting a new trial the trial judge made and entered a written order in which he, in substance, stated that, after having considered an additional letter produced as newly discovered evidence, and after reconsidering the evidence submitted on the trial, he failed to find sufficient evidence of an alleged agreement on the part of the appellant not to present any claim against the estate of the deceased father, or give publicity to the defalcation, and that he granted a new trial upon the ground that the record failed to show any lawful consideration for the notes. The only newly discovered evidence was a letter from the cashier of the bank, the respondent had at the time of the trial and could not then find, but which he did find immediately afterwards. The letter was written to respondent on September 18, 1903, and after stating the amount of the defalcation, reads as follows:

"What can you do? It must be fixed up soon. Examiners may drop in at any time. Will you give your note for 6 or 12 months int. 6% with what security you can, and send it now so it can be entered up and books made right, and come yourself later whenever you can get away. Anything I can do will do gladly. Attend to this at once and oblige."

The respondent contends that the order granting a new trial should not be disturbed; that it was within the discretion of the trial judge; that no abuse of discretion has been shown; that considering the newly discovered evidence with the evidence previously produced, it becomes apparent that there never was any consideration, lawful or otherwise, for the notes, and that the appellant's cashier took advantage of the respondent by prevailing upon him to execute the notes for the sole purpose of satisfying the bank examiner.

The rule that an order granting a new trial cannot be reversed except for an abuse of discretion does not apply when the entire record shows that the evidence necessarily and without conflict sustains the verdict of the jury or finding of the trial court; that it admits of no other conclusion, and that

there is no competent or material evidence to the contrary. The letter contains no newly discovered evidence, being cumulative only. On the trial the respondent testified that either that or some other similar letter had been mislaid by him and could not be found, and was permitted to state its contents. He testified as follows:

"Q. State to the court what the contents of that letter was with reference to why these notes were to be given? A. That the account was overdrawn and that the bank examiner would be liable to be along at a short interval and that he hadn't mentioned the matter to the directors, and wanted to know if I could do anything towards fixing it, and I said I didn't know what I could do, and asked him what the amount was and further particulars, to which he replied that it was something in the neighborhood of $4,700 and that he would suggest that it be put in the form of a note, so that the bank examiner wouldn't have any questions to ask him which might be embarrassing, and that is the substance of it, and I signed the notes which he sent forward at that time."

The fact that the cashier desired an adjustment of the shortage before the arrival of the bank examiner does not necessarily show an unlawful or invalid consideration. Such a desire was certainly business-like, and no improper motive can be inferred from the single fact that the cashier communicated it to the respondent and requested him to make a settlement of the defalcation by giving his notes. The newly discovered letter adds no material fact to the case, nor does it sustain the respondent's contention that the notes were given without any valid consideration or for an invalid consideration. Respondent admitted that he did not want his father's defalcation made public. He so stated in letters written to appellant before and at the time of the execution of the original notes. The bank could only keep the matter quiet by refraining from making any claim against the father's estate, thus releasing its claim, which it did. Respondent must have contemplated this forbearance on the part of the bank when he wrote the letters and later executed

the notes. In his letter of October 18, 1903, transmitting the original notes to the appellant bank, he said:

"I sign and inclose the notes herewith and will try to pay every dollar in the specified time. But you know what a hard thing that is with limited resources. I forward this with the understanding that this unhappy affair is known only to myself and you."

The writing of this letter, which was in evidence, is admitted by the respondent. His claim that the notes were not to be paid by him is effectually disputed by it, and by his subsequent acts in making renewals and partial payments. The undisputed facts and circumstances of this case lead to the inevitable conclusion that the consideration for the notes was the forbearance of the bank from prosecuting or pressing its valid claim against the father's estate. Such forbearance upon its part constituted a good and valid consideration. *Bissinger v. Lawson*, 57 Miss. 36; *Nowlin v. Wesson*, 93 Ala. 509, 8 South. 800; *Carpenter v. Page*, 144 Mass. 315, 10 N. E. 853; *Taylor v. Clark* (Tenn.), 35 S. W. 442.

The respondent earnestly insists that the evidence was conflicting, but we find no conflict of material or competent evidence. He alleged in his answer, and testified on the trial, that the notes were without consideration, but such statements were his own conclusion from undisputed and proven facts which did not warrant any such conclusion. If a new trial were to be had either with or without a jury on the same evidence and the newly discovered letter, it would be the duty of the trial judge to sustain the appellant's motion for a directed verdict or judgment in its favor, the respondent having utterly failed to sustain his defense of no consideration, and an order denying such motion would be reversed by this court on appeal.

The judgment is reversed, and the cause remanded with instructions to deny the motion for a new trial.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8390. Department Two. November 12, 1909.]

J. W. STANCHFIELD, *Appellant*, v. BERT BLESSING, *Respondent*.[1]

TAXATION—FORECLOSURE—SUMMONS—CERTAINTY—DESCRIPTION OF LAND. A tax foreclosure summons is not so uncertain as to render the judgment void merely because of the use of the word "or" instead of "of" in describing the "N. E. ¼ of the S. W. ¼" of a certain section, where it was followed by "40 acres," denoting the quantity of the land.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 4, 1909, in favor of the defendant, upon an agreed statement of facts, in an action of ejectment. Affirmed.

Willett, Oleson & Willett, for appellant.

McBurney & Cummings, for respondent.

MOUNT, J.—Appellant brought this action in ejectment. After issues were joined, an agreed statement of facts was made. It was agreed that the appellant is the owner of the land in controversy, unless the title of his grantor was divested by a county tax foreclosure proceeding conducted by King county. It is stipulated that, on January 31, 1898, a certificate for delinquent taxes for the years 1888, 1893-4-5, in the sum of $58.91, was issued to King county. The land was properly described in the certificate, and was assessed for the years 1893-4-5 to George Vanderbeck, the owner. On December 31, 1901, King county began an action to foreclose this certificate. The lands were properly described in the complaint as "the N. E. ¼ of the S. W. ¼ of Sec. 35, Twp. 20, North, Range 6, East W. M." On January 1, 1902, and for six successive weeks thereafter, a summons or notice was regularly published, which described the owner, the property, the years for which taxes were delinquent, and

[1]Reported in 104 Pac. 800.

the amount of delinquency, as follows: "George Vanderbeck, ne ¼ or sw ¼ sec 35, tp 20, r 6, 40 acres, 1888-1893-4-5, 58 91." On September 29, 1902, a judgment was rendered in all respects regular, except the description of the property, which was the same as is last above quoted. On November 15, 1902, after due notice, the property was offered for sale, and bid in by King county. On May 8, 1903, the treasurer of King county issued his tax deed, conveying the property to King county. This deed described the property as "the N. E. ¼ of the S. W. ¼ Sec. 35, Tp. 20 North, Range 6 East, King county, Washington." The plaintiff claims by mesne conveyance from George Vanderbeck, while the defendant claims by mesne conveyance from King county. Upon these facts the lower court granted a judgment in favor of defendant, and the plaintiff has appealed.

It will be noticed that the only defect in the tax foreclosure proceedings is the use of the word "or" in the description contained in the summons and judgment. It is claimed by the appellant that the use of the word "or" instead of the word "of" rendered the whole tax proceedings void, for the reason that no particular tract of land was described, and the description used in the summons and judgment was so ambiguous and uncertain as to amount to no description. It is apparent to our minds that the word "or," as used in the summons and judgment, was a mere clerical or typographical error, so apparent upon the face of the record that no one was or could be misled by it. The words "40 acres" following the description show plainly that the word "of" was intended, because the words "40 acres" denote the quantity of land described. They aided the preceding description, and make that definite which otherwise might have been indefinite. A quarter of a quarter section of land is forty acres, while the northwest quarter or southwest quarter would be one hundred and sixty acres of land. Appellant argues that the words "40 acres" make the description more indefinite. This is probably true if the description must be

read literally, but it is so apparent that the letter "r" was used by mistake for the letter "f," that the description must not be read literally. The object of the summons was notice to the owner. We are clearly of the opinion that it was sufficient to give the owner notice of the land which was intended to be described and which was in our opinion described with reasonable certainty.

The judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

[No. 8120½. Department One. November 12, 1909.]

IDA KEANE, *Respondent*, v. THE CITY OF SEATTLE, *Appellant*.[1]

MUNICIPAL CORPORATIONS—NEGLIGENCE — DEFECTIVE SIDEWALKS — PROXIMATE CAUSE. Where plaintiff's companion was struck by a bicyclist, causing plaintiff to fall and step into a hole in the sidewalk due to a missing plank, breaking her ankle, the missing plank is the efficient cause of the injury.

DAMAGES—PERSONAL INJURY—EXCESSIVE VERDICT. A verdict for $3,000 for a broken ankle is not excessive, where it appears that the plaintiff was thirty-five years old, engaged in domestic service, that she lost several months' time, spent $320 for doctor's bills, part of the ankle bone was removed, and there was some evidence that the injury was permanent.

TRIAL—SPECIAL INTERROGATORIES—DISCRETION. The refusal to submit special interrogatories to a jury is discretionary, and error cannot be predicated thereon.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 7, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained upon a defective sidewalk. Affirmed.

Scott Calhoun and *James E. Bradford*, for appellant.

Million & Houser and *George Friend*, for respondent.

[1]Reported in 104 Pac. 819.

CHADWICK, J.—There is no dispute as to the facts in this case. Plaintiff and her father were walking upon the sidewalk in the city of Seattle, when she heard the ringing of a bicycle bell. She took her father, who was quite old, by the arm, to draw him to one side to allow the bicycle to pass. At that moment the bicycle struck plaintiff's father, throwing him to the ground. He fell against plaintiff, who in turn fell, but as she did so stepped in a hole occasioned by a missing board in the sidewalk, and broke her ankle. From a judgment in favor of plaintiff in the sum of $3,000, the city has appealed, raising the following questions of law: The legal sufficiency of the evidence; the refusal of the court to give certain instructions; excessive damages; and the refusal of the court to submit some special interrogatories to the jury.

Under the first assignment, appellant seeks to throw the case within the rule that, if an injury may have resulted from one of two causes, for one of which the party charged would be liable but not for the other, then no recovery can be had. That this is a fixed principle of law, there can be no doubt, but in our opinion it can have no application to the case at bar. As we understand that rule, it cannot be invoked unless there is uncertainty and doubt between two distinct causes separately initiated. But where one suffers an injury and it appears that the acts of negligence are concurring, but one is remote and the other immediate—or in other words the actual injury complained of would not have occurred but for the cause initiated by the defendant, that is held to be the proximate cause, and recovery is allowed. The missing board was clearly the efficient cause without which plaintiff would not have broken her ankle. *Eskildsen v. Seattle*, 29 Wash. 583, 70 Pac. 64. The court very carefully instructed the jury that they must find that respondent was injured in consequence of the missing plank, or she could not recover. The finding of the jury is, therefore, determinative of the question of proximate cause, and can-

not be disturbed. *Hoveland v. Hall Bros. Marine R. etc. Co.*, 41 Wash. 164, 82 Pac. 1090; *Gray v. Washington Water Power Co.*, 27 Wash. 713, 68 Pac. 360.

It is further contended that the damages awarded are excessive. The evidence shows, that the respondent was thirty-five years old at the time the accident occurred; that she was put to an expense of $320 for doctor's bills and hospital fees; that she lost several months' time; that she was engaged in domestic service, and capable of earning $25 per month; that she was compelled to undergo an operation wherein some part of the ankle bone was removed, and there is some evidence to show that the injury is permanent. Under the facts disclosed, while the verdict is substantial, we cannot say as a matter of law that it is not sustained by the evidence, and we therefore decline to reduce it.

The court refused to submit certain interrogatories to the jury. Error cannot be predicated upon this assignment. This court has so frequently held that the submission of special interrogatories to the jury is wholly within the discretion of the trial judge that no citation of authority is necessary.

Judgment affirmed.

RUDKIN, C. J., FULLERTON, GOSE, and MORRIS, JJ., concur.

[No. 8391. Department Two. November 12, 1909.]

O. A. PATTISON, *Appellant*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Respondent*.[1]

RELEASE—FRAUD IN PROCURING—EVIDENCE — QUESTION FOR JURY. There is sufficient evidence of fraud in procuring a release of damages by reason of personal injuries to make a question for the jury, and it is error to grant a nonsuit, where it appears that, as an inducement to the plaintiff's signing a release for the sum of "$600 and treatment till cured of this trouble by N., medical gymnast," two of the defendant's doctors advised him to take the treatment and represented that he would be cured and that his injuries were slight, that he relied thereon, and that his injuries were much more serious than represented and he could not be cured by the treatment; and that N., while treating him for the defendant, urged him to make the settlement because he would soon be well, notwithstanding that such advice may have been matter of expert opinion, and not intentionally false.

Appeal from a judgment of the superior court for King county, Ronald, J., entered July 7, 1909, upon granting a nonsuit at the close of plaintiff's case, after a trial before a jury, in an action for personal injuries. Reversed.

Robert A. Devers, Hastings & Stedman, and *Milo A. Root*, for appellant. The confidential relationship of physician and patient justified appellant in relying upon the representations made by the physicians. Having been thus misled by defendant's physicians, appellant is not bound by the "release." *Bjorklund v. Seattle Elec. Co.*, 35 Wash. 439, 77 Pac. 727; *Houston etc. R. Co. v. Brown* (Tex. Civ. App.), 69 S. W. 651; *Great Northern R. Co. v. Fowler*, 136 Fed. 118; *Lumley v. Wabash R. Co.*, 76 Fed. 66; *International & G. N. R. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189; *Fleming v. Brooklyn Heights R. Co.*, 88 N. Y. Supp. 732; *Culbertson v. Blanchard*, 79 Tex. 482, 15 S. W. 700; *Pendarvis v. Gray*, 41 Tex. 326; *Peterson v. Chicago, M. &*

[1]Reported in 104 Pac. 825.

St. P. R. Co., 38 Minn. 511, 39 N. W. 485; *Woodbury v. Woodbury*, 141 Mass. 329, 5 N. E. 275, 55 Am. Rep. 479; *Bliss v. New York etc. R. Co.*, 160 Mass. 447, 36 N. E. 65, 39 Am. St. 504; 9 Cyc. 456-458, and cases cited; Pomeroy Equity Jurisprudence, §§ 956, 963. It was not necessary to the maintenance of this action that the representations of the doctors should have been knowingly false. *Lawson v. Vernon*, 38 Wash. 422, 80 Pac. 559, 107 Am. St. 880; *West v. Carter*, 54 Wash. 236, 103 Pac. 21; *Sears v. Stinson*, 3 Wash. 615, 29 Pac. 205; *Daniel v. Glidden*, 38 Wash. 556, 80 Pac. 811; *McMullen v. Rousseau*, 40 Wash. 497, 82 Pac. 883; *O'Connor v. Lighthizer*, 34 Wash. 152, 75 Pac. 643; *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Gillully v. Hosford*, 45 Wash. 594, 88 Pac. 1027; *Lumley v. Wabash R. Co.*, 76 Fed. 66. Whether the representations of the physicians amounted to a fraud upon appellant and whether they were knowingly false, or relied upon, was for the jury. 14 Am. & Eng. Ency. Law (2d ed.), pp. 24, 88, 120, 121, 194; 29 *Id.* 654-7; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289, 82 Pac. 271; *Bjorklund v. Seattle Elec. Co.*, 35 Wash. 439, 77 Pac. 727; *Sanford v. Royal Ins. Co.*, 11 Wash. 653, 40 Pac. 609; *Strand v. Griffith*, 97 Fed. 854; *Noyes v. Belding*, 5 S. D. 603, 59 N. W. 1069; *Watson v. Molden*, 10 Idaho 570, 79 Pac. 503, and cases above cited. The doctrine that one may deceive another and then urge that the victim should not have been deceived thereby, is not looked upon with favor. *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799; *Curtley v. Security Sav. Society*, 46 Wash. 50, 89 Pac. 180; *Hanson v. Tompkins*, 2 Wash. 508, 27 Pac. 73; *Landis v. Wintermute*, 40 Wash. 673, 82 Pac. 100.

Morris B. Sachs, for respondent, contended, among other things, that a voluntary release acquiesced in for two years should not be set aside. *Groenendyke v. Coffeen*, 109 Ill. 325; *Valentine v. Wysor*, 123 Ind. 47, 23 N. E. 1076, 7

L. R. A. 788; *Yeamans v. James*, 29 Kan. 373; *Swayze v. Swayze*, 37 N. J. Eq. 180; *Fraser v. Hext*, 2 Strobh. Eq. (S. C.) 250; *Kercheval v. Doty*, 31 Wis. 476; *Strong v. Strong*, 102 N. Y. 69, 5 N. E. 799; *Johnston v. Furnier*, 69 Pa. St. 449. A compromise will not be set aside where both parties had or could have had equal knowledge of the facts. *Smith v. Paris*, 53 Mo. 274; *Carlisle v. Barker*, 57 Ala. 267; *Motley v. Motley*, 45 Ala. 555; *Otto v. Long*, 127 Cal. 471, 59 Pac. 895; *Pattison v. Albany Bldg. & Loan Association*, 63 Ga. 373; *Harrison v. Dewey*, 46 Mich. 173, 9 N. W. 152; *Judd v. Blake & McIntyre*, 14 Vt. 410; *Hennessy v. Bacon*, 137 U. S. 78, 34 L. Ed. 605; *Hager v. Thomson*, 1 Black (U. S.) 80; 17 L. Ed. 41; *Massachusetts Mut. Life Ins. Co. v. Hayes*, 21 Ill. App. 258; *Durkee v. Stringham*, 8 Wis. 1. The statements of the physicians were opinions. *Nelson v. Minneapolis St. R. Co.*, 61 Minn. 167, 63 N. W. 486.

PARKER, J.—This action was brought to recover damages for personal injuries alleged to have been sustained by plaintiff in a collision upon defendant's railway, on August 5, 1906, while riding as a passenger in one of its cars, resulting from the negligent operation of the cars. Damages in the sum of $5,000 is claimed by plaintiff, for which he prays judgment against the defendant, less the sum of $600, which he acknowledges to have been paid by defendant.

In its answer, after denying the allegations of the complaint as to the cause and extent of the injuries, the defendant, as an affirmative defense, alleges in substance, that on the 3d day of October, 1906, plaintiff executed and delivered to it a release of all claims for damages on account of said injuries, wherein the consideration is recited as being, "The sum of $600 and treatment till cured of this trouble by C. L. Norbom, medical gymnast."

Replying to this affirmative defense, plaintiff alleges, in substance, that after the injury defendant sent to plaintiff a physician and said Norbom, medical gymnast, who examined plaintiff as to the nature and extent of his injury, and

advised him that his injury was not of a serious nature, and would not prove permanent; that they could and would effect a cure within six months; that plaintiff's only loss by reason of the injury would be the loss of his time during the period necessary to effect a cure; that, at the time of signing the release, plaintiff did not know the extent or nature of his injury, and had no means of knowing the same other than through the statements of said physician and gymnast; that he believed such statements to be true, and relying thereon he signed the release; that the statements and representations as to the extent and nature of his injury were not true, and were made for the purpose of inducing plaintiff to sign the release; the plaintiff took treatment of said Norbom as directed by defendant, and until said Norbom advised him that he could not be cured, and that his injury would prove permanent; that the sum of $600 was received by him upon these conditions only, that said sum is grossly inadequate to compensate him for his injury, and that said sum was not accepted in full for the injury and damages actually sustained, but upon the statements and misrepresentations of said physician and medical gymnast acting in behalf of defendant. The cause proceeded to trial before the court and a jury. Upon the close of the evidence, counsel for defendant moved for a nonsuit, which was granted, the cause dismissed and the jury discharged; from which disposition of the case plaintiff has appealed to this court.

As we understand the contention of counsel for the respective parties, there is no question raised as to the sufficiency of the evidence to carry the cause to the jury upon the merits, the arguments in the briefs of both parties being directed only to the sufficiency of the evidence to require submission to the jury on the question of whether or not the release set up as a defense was procured by misrepresentation and fraud. It was evidently upon the theory that there was not sufficient evidence to support a finding in appellant's favor upon this question that the learned trial court took

the cause from the jury and decided, as a matter of law, that the release was not procured by fraud.

There is evidence tending to show, that the first physician who called upon and treated appellant after the accident, for the injuries there received, was Dr. Guthrie, one of the regular surgeons of respondent, and who had also on occasions prior thereto rendered medical services to appellant's family, but whether or not he was then called at the instance of the respondent is not shown; that he called upon appellant five or six times professionally; that about three weeks after the accident, upon the recommendation of Dr. Guthrie, appellant commenced taking treatment from C. L. Norbom, medical gymnast, whose treatments continued at frequent intervals for more than a year, that appellant paid Norbom for the first two or three treatments, while repondent paid for all subsequent ones, amounting to over $700; that this was in accordance with an arrangement made with Norbom by the respondent prior to the signing of the release. Among other testimony of appellant is the following:

"Q. State whether or not you continued the treatment with Dr. Norbom right along up to the time of the release. A. Yes, and afterwards. Q. Now, during that time state whether or not you made apparently progress toward getting improved. A. On the start I did improve very rapidly and Dr. Norbom told me that the best thing for me to do was to get settlement with the company as soon as possible because I would get well before long. . . Q. State what the Dr. said as to your condition, and whether you were going to get well speedily. A. He stated that ordinarily those cases would take from thirty to sixty days. Q. State whether or not you relied upon these statements that he made. A. I did, implicity, sure. He is the only man I had to rely on, except Dr. Shannon. Dr. Shannon said I would get well. . . Q. Who is Dr. Shannon? A. Well, one of the company's physicians. Q. Did he treat you? A. Not for treatment—for examination. Q. When did Dr. Shannon make this statement, as to the time of signing the release, before the signing? A. Before the signing of the release. That was some days before the signing of the release. . . Q. You may state

to the jury what was the chief inducement to you to sign that release? A. Dr. Norbom's statement. . . Dr. Norbom told me more than once that I would get well. He was the man that was treating me. He was the only man that I had to rely on. I relied implicitly upon what he told me. . . Q. What did he say to you? A. He said that I had better settle with the company. That there was no bones broken, and nothing to show for an injury after I got well. . . Q. Now was there anybody else that you went to in regard to these injuries? A. Shannon. Q. And you went there at the request of defendant? A. Yes."

It is clear that there was sufficient evidence to warrant the conclusion that Dr. Guthrie was one of the regular physicians of the respondent when he attended appellant and advised him to go to Norbom, the medical gymnast, for treatment, though he might also be regarded as appellant's family physician at the same time. It is also clear that the evidence would support the conclusion that Dr. Shannon was one of respondent's physicians at the time of the statement testified to by appellant above quoted. The evidence of the relation of Norbom to the respondent at the time of advising settlement is not very satisfactory. Appellant testified that there was an arrangement between the claim agent of respondent and himself by which Norbom was to treat him at respondent's expense, before Norbom advised the settlement. Appellant was not present when the arrangement was made between Norbom and respondent; but his testimony is to the effect that the claim agent gave him to understand such arrangement had been made. That Norbom was treating appellant at the instance and expense of respondent, at the time of the release and after, is indicated by the words of the release, and the payment of Norbom by respondent. There was sufficient evidence for the jury's consideration tending to show that appellant's injuries were very much more serious than stated by Norbom and Dr. Shannon to appellant, which he testified induced him to sign the release, and that the $600 paid appellant upon the release was not adequate compensation therefor, and that appellant relied upon the state-

ments of Norbom and Dr. Shannon as to the extent of his injuries at and prior to the signing of the release.

The principal contention of learned counsel for respondent seems to be that there was not sufficient evidence to go to the jury showing Norbom's relation to and employment by respondent at the time the statements are claimed to have been made by him, inducing appellant to make the settlement, and therefore respondent could not be held liable for any such statements. We also understand from the remarks of the learned trial judge, shown by the record, that this was the principal reason for granting the nonsuit. In view of the recommendation of Norbom by Dr. Guthrie, the respondent's physician, though he may also have been appellant's physician, the testimony as to the arrangements for Norbom's treatment for appellant, and all the circumstances shown, we think it was for the jury to determine when Norbom first began treating appellant at the instance of respondent, and as to whether or not the statements relied upon by appellant were made by Norbom after he was employed by respondent.

It is further contended in behalf of respondent, that the statements made by Norbom, which are claimed to have induced the settlement, must have been then known by him to be untrue, and something more than his opinion as to appellant's condition and when he would recover, in order to entitle appellant to avoid the release. In the case of *Houston & T. C. R. Co. v. Brown* (Tex. Civ. App.), 69 S. W. 651, the court uses this language:

"We cannot agree with the contention of appellant that it may escape liability on the ground that the representations and statements made by Stewart was a mere expression of opinion. It was more than an opinion,—it was the statement of a fact. The effect of his statement was that the appellee was a sound man, and that the bones of his arms had knitted together, and that it would be all right. It is true this statement may have been predicated upon his opinion as a medical expert, but the opinion is based upon facts

of which he possessed knowledge. The fact that the statement made by Stewart was not intentionally false does not affect the right of the appellee to have the release set aside if he was misled by the statement, and executed the release believing the statement was true. In such a case, innocent misrepresentations may as well be the basis of relief as where such statements are intentionally false."

It is true, in this case, that the statements of Norbom may in a sense be regarded as an expression of his opinion touching the future recovery of appellant, but the unqualified manner in which they were made, coupled with the urgent recommendation for settlement, rendered them as effectual in inducing appellant to make the settlement and sign the release as if they had been false statements touching the present physical condition of broken bones. We think the fact that Norbom may have unintentionally misrepresented to appellant his true condition at the time would not, of itself, prevent the avoidance of the release, if as a matter of fact such representations were untrue, were made in the interest of respondent, and did induce appellant to sign release. This was for the jury to determine under all the circumstances shown by the evidence.

We conclude that the learned trial court was in error in taking the cause from the jury. The judgment is reversed, with directions to grant appellant's motion for a new trial.

CROW, DUNBAR, and MOUNT, JJ., concur.

[No. 8203. Department Two. November 13, 1909.]

MORES AVERBUCH, *Respondent*, v. GREAT NORTHERN RAILWAY COMPANY *et al.*, *Appellants*.[1]

RAILROADS—ACCIDENT AT CROSSING—LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The evidence does not show as a matter of law that plaintiff, injured at a railroad crossing, could have seen an approaching engine if he had looked, from the fact that photographs, taken long after the accident, and other evidence of the defendant so indicates, where there was a sharp conflict in the evidence on that point, disinterested witnesses at the time of the accident supported plaintiff's contention that obstacles cut off his view, and the jury, after a view of the premises, found for the plaintiff.

SAME—EVIDENCE—SUFFICIENCY. The plaintiff, injured while driving a delivery wagon across two railroad tracks, is not guilty of negligence in not stopping a second time to look and listen after he got onto the tracks, where it appears that he stopped as near the tracks as possible and looked and could see or hear no train, whistle, or bell, that he could see a distance of 175 to 250 feet down the track, and had but 35 or 40 feet to drive; that he was driving at about 4 miles an hour, and if the engine had not exceeded the speed limit of six miles, he could have crossed in safety, and could have heard a signal had one been given by an engine within striking distance.

SAME—TRIAL—INSTRUCTIONS. An instruction is not objectionable as stating that the pleadings admitted that obstructions obscured the view down a railroad track, where it simply stated that it was admitted that the tracks crossed a street used by the public, and that the crossing was dangerous because of its proximity to business interests.

APPEAL AND ERROR—REVIEW—HARMLESS ERROR—TRIAL—INSTRUCTIONS. In an action against a railroad company and its engineer, to recover for personal injuries sustained at a railroad crossing, it is not prejudicial to give an instruction to the effect that both defendants would be liable for any negligence by the engineer, where there was no question of any negligence except that of the engineer in running the company's engine over the crossing.

TRIAL—INSTRUCTIONS—HARMLESS EXPRESSIONS. It is not prejudicial error, that in directing the form of the verdict, the court inadvertently started to say what the form should be if the jury should "happen" to find for a party, where the remark was immediately corrected.

[1]Reported in 104 Pac. 1103.

SAME—REQUESTS—FORM OF INSTRUCTIONS. A party is not entitled to an instruction in any particular form of words, where its substance is given.

Appeal from a judgment of the superior court for King county, Gay, J., entered April 8, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained at a railroad crossing. Affirmed.

F. V. Brown and *Frederic G. Dorety*, for appellants.

Robert H. Evans and *William Parmerlee*, for respondent.

DUNBAR, J.—This is a personal injury case. The plaintiff was thrown from his wagon by a locomotive of the defendant railway company, and injured, on the 29th day of September, 1908, upon a public highway crossing one of defendant's tracks. The above action was brought to recover damages for injury against the railway company and the defendant E. P. Sheerer, who was engineer in charge of the engine. The case was tried to a jury, and verdict rendered in favor of the plaintiff in the sum of $2,683. A challenge by the defendants to the sufficiency of the plaintiff's evidence, at the close of plaintiff's case and at the close of all the evidence, was overruled. A motion for judgment notwithstanding the verdict was denied. Judgment was entered, and appeal followed.

The jury and the court viewed the premises where the accident happened. Averbuch, respondent, and the witness Boyce, who chanced to be in the wagon with him, were driving along in the alley leading from Broad to Eagle street, in an ordinary delivery wagon with a cover on it, which, as the testimony shows, came even at the side with the front of the seat. There was some other testimony in relation to this wagon, but we think that the jury could rightly conclude from the testimony that such was its condition. The wagon was drawn by a single horse. The railway tracks at the point where the accident occurred run northerly and southerly along the water front or trestle, which is partly planked over. Fifty

feet or so further out in the water is a planked roadway, also running northerly and southerly, and parallel with the railway tracks. Eagle street runs down to the shore line, and crosses the bridge upon which the tracks lie at right angles, continuing westerly over a short bridge to the planked roadway just mentioned.

Both the Great Northern and Northern Pacific companies have main track lines at this point, the Great Northern track being on the west nearest to the water, and the Northern Pacific track being east of the Great Northern and on the land side. A Northern Pacific switch or spur track joins the Northern Pacific main track at Eagle street, and runs south, lying east of the Northern Pacific main track and on the opposite side from the Great Northern. The extremity of the switch is near the northerly edge of Eagle street, and the frog near the southerly edge. Eagle street is planked across the entire right of way. There are sixteen or seventeen feet in the clear between the two main tracks.

When respondent reached a point within two or three feet of the planking, and within six or seven feet of the Northern Pacific track, he stopped the wagon and, before attempting to go over the crossing, looked both north and south along the tracks for any train that might be passing. Previous to this, his view had been obstructed by buildings, sheds, etc. According to his testimony, not seeing or hearing any engine approaching, he drove on to the track, passed over the Northern Pacific track, and when his horse's feet were up on the Great Northern track between the rails, the engine rushed on to him and did the damage complained of.

On the merits of the case, the appellants make two contentions: (1) that the respondent could easily have protected himself by looking south after reaching the planking; (2) that the fact that he stopped and looked when he did, and when his view was obstructed, was no excuse for his failing to look when on the planking, and is not a sufficient compliance with the law to make the question of his negligence one

for the jury; and it is contended that, where it is certain from the physical situation that the plaintiff must have seen the engine if he stopped to look, the jury will not be permitted to believe his statement that he did stop and look but did not see the engine.

This contention, as an abstract proposition, is undoubtedly true, but in this case it probably assumes a fact which, under competent testimony, the jury must determine, viz., do the physical facts show that the plaintiff could have seen if he had looked. It is also doubtless true, as learned counsel argues, that the stop, look and listen phraseology is frequently considered too literally or too mechanically. The rule is not intended to be a formula, or its mechanical observance an excuse for negligence or heedless action. Common observation has taught us that a railroad track is a signal or notice of danger, and the courts have almost universally said that it is such a notice as would put a prudent man on guard, and that when he receives this notice his duty is to stop, look and listen before venturing on to the track; or that he must act as an ordinarily prudent man would act under like circumstances if dangers of other kinds were threatening him. That is all there is to the doctrine; and, of course, it will not clear him of the charge of negligence, if he looks and listens only where such acts are unavailing and senseless. On the other hand, the rule is not intended to prohibit recovery under all circumstances where a person is run down on a railroad track, as would be the case if appellant's theory were carried to its logical conclusion; which would be to the effect that an engine appearing on the track shortly after he looked would be conclusive proof that he did not look, or that if he did look, he either saw it or did not look from the proper place, and was therefore negligent.

So that the practical question remains, do the established facts of this case bring it within the modified rule contended for by counsel, and within the many cases cited to sustain the rule. By "established facts," is meant questions of fact

which are passed upon by the jury under competent testimony and correct instructions. The respondent testified that he could see down the track from where he stopped to look two hundred and fifty or three hundred feet; that he could not see further by reason of his view being obstructed by box cars, coal sheds, and other structures. Respondent's witness Boyce, who was in the wagon with him at the time of the accident, and who seems to be a very intelligent witness and a man of considerable experience with railroads and engines, and entirely disinterested, testified that he could see one hundred and seventy-five feet south, and also testified as to the obstructions to further view on the track. Another witness testified that he went along in a wagon over the same road traveled by the respondent, and passed the place where the accident occurred, the next morning after the accident; that he noticed particularly and that the respondent could not have seen the distance it was claimed by the appellant that he could have seen when he claims that he looked. His testimony confirmed the testimony of Boyce, and was positive and convincing. Other testimony was to the same effect.

The defense offered testimony exactly to the contrary, tending to show that there were no obstacles to a longer view, and that respondent could have seen the approaching engine, or at least the top of it, if he had looked where he claims he looked, introducing photographs and other technical proof to substantiate this claim. So far as the photographs are concerned, there is no showing when they were taken, the only testimony being that it was not within a short time after the accident, but that, in the language of the witness, "it was a long time after." It is not conceded that the conditions were the same except that they showed the general plan. The seeming view as shown by the photographs under the circumstances should not outweigh the direct and positive testimony of witnesses who say that they saw certain obstructions to the view on the track at the time of the accident; and this view of the case was appreciated by

learned counsel for appellants in the trial of the cause, who, in urging a view of the premises, said:

"We are very anxious to have the jury view the premises before this case is over. There will be a sharp issue in the case as to how far down this track a person standing on the crossing could see and while these photographs are enlightening they are not like seeing the place itself. I should like to have both the court and the jury view the premises."

The conflict in the testimony was sharply drawn by witnesses whose integrity was not assailed, and who, with the exception of the respondent, were evidently entirely disinterested. So that, instead of its being established that the physical facts show that the respondent could have seen the approaching engine from the point where he says he looked, it must be considered an established fact in the case that he could not have seen it; especially in view of the fact that the premises were viewed by both judge and jury, that the place of the accident was pointed out to them under the instructions of the court, that they could see the whole situation and pass upon the credibility and reasonableness of the witnesses, aided by this knowledge of the situation. This applies to the judge who refused the challenge to the sufficiency of the evidence, as well as to the jury.

For the same reason it must be considered an established fact in this case, that the ordinance of the city prohibited a speed of the engine in question, at the place in question, greater than six miles an hour; that the engine was in fact running from seventeen to twenty miles an hour; that the appellants were backing the engine, and that the engineer's view of the track was completely shut off by the tender; that the bells and whistles of the locomotive were not sounded; and as tending to show the rate at which the engine was running, that it did not stop until it reached a distance of one hundred and thirty or forty feet beyond where it struck the wagon, the fireman and engineer discovering the situation of the respondent about seventy-five feet before it reached him.

The other proposition of the appellants, viz., that the re-

spondent was guilty of negligence in not looking after he got up onto the tracks, is the only question that is left in the case. It may be conceded that the respondent stopped at a proper place to look and listen in the first instance. To reach safety he only had to drive between thirty-five and forty feet from the place where he stopped to look, to clear the tracks altogether. He stopped as near as he could to the tracks when he came to them, and he testified that he could see a distance of two hundred or two hundred and fifty feet down the Great Northern track. While it is contended that he should have stopped after he got onto the tracks, to listen, it is a matter of common knowledge that stopping a wagon on a railroad track is a very dangerous proceeding. So far as respondent knew, there was as much danger in the first track that he was crossing as there would be in the second or third. He made his observation from as near a point as he could make it before he went onto the track, and when he went onto the track it would be a natural and prudent impulse to hurry over the tracks at as rapid a speed as possible, especially where the distance was so short. He had listened for the bells and signals. He had been looking for the approach of the engine. There was just as much danger of an approach from the north side, where he said he was looking when the engine overtook him, as there was from the south side; and while the respondent was looking to the north, his fellow passenger was looking to the south, as they passed over this dangerous piece of ground. After he had looked to the north and saw no train coming, he turned his attention to the south, but it was then too late.

The only question is whether he should have stopped a second time to look and listen after stopping where he did in the first instance. This question must be answered by a consideration of all the facts in the case. The claim of the appellants that respondent had shut himself up in his wagon or hack where he could not see is not substantiated by the testimony, the respondent testifying that he could see by

leaning forward slightly. The wagon seems to be the ordinary wagon that is driven by deliverymen in this country. According to respondent's testimony, the wagon was going from three to five miles an hour. According to the testimony of others, from four to five miles an hour. Accepting four miles as probably a correct estimate of the distance per hour it was traveling, he would be justified in concluding that, if the engine or train was approaching at the rate of six miles an hour, and conceding that he could only see one hundred and seventy-five feet south on the track, he would travel one hundred and sixteen feet while the engine would be traveling one hundred and seventy-five feet; and under such calculation as this, he would be justified in concluding that he would have plenty of time in which to get across the track, which he would have had. Again, he would have been justified in concluding that there was no engine within that distance of him, because if there had been, he testified that he could have heard the bells and whistles which the law provided for. So that, under the circumstances of the case, we think he was justified in hurrying over the track after he had once entered upon it, and he was doing all that a driver of a vehicle could be expected to do under the circumstances, by guiding his horse across these railroad tracks and looking as well as he could for danger from one side to the other, while the same time engaged in giving that attention to his horse which was necessary for him to give.

The appellants cite several cases on this proposition, and many are cited also by the respondent. Included in those cited by appellants are several from this jurisdiction, viz: *Cable v. Spokane & Inland R. Co.*, 50 Wash. 619, 97 Pac. 744; *Ladouceur v. Northern Pac. R. Co.*, 4 Wash. 88, 29 Pac. 942; *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826; *Anson v. Northern Pac. R. Co.*, 45 Wash. 92, 88 Pac. 1058, and *Gregg v. Northern Pac. R. Co.*, 49 Wash. 183, 94 Pac. 911. But all cases of this character must of necessity be brought under different states of facts, every

case to a great extent being determined by the particular facts of that case.

In *Cable v. Spokane & Inland Empire R. Co.*, *supra*, the plaintiffs did not stop before crossing the railway track. They said they had looked before they got to the track. Their mistake was that they thought that the train which they heard approaching was a local train which would stop at the station, and therefore they thought they would be safe in driving on to the track below the station. This court in that case said: "These people did not stop before crossing the railway track. Had they done so shortly before reaching the crossing, they could plainly have seen and heard the approaching train." In this case it will be seen that the respondent did exactly what the court in that case criticised the plaintiffs for not doing. The court continuing says: "If they looked or listened, it was not at a time or place where looking or listening revealed to them the true condition of affairs." In this case, the looking or listening would have revealed to the respondent the true condition of affairs, if the appellants had been complying with the law, which the respondent had a right to suppose they would comply with. We think the case is not in point.

And so in the case of *Ladouceur v. Northern Pac. R. Co.*, *supra*. There the court had taken the case from the jury on the theory that the plaintiff had been guilty of contributory negligence in driving on to a track under the circumstances which he did, and this court reversed the case and sent it back with instructions to submit the case to the jury. The only comfort that appellants can derive from that case is that their contention was sustained by the dissenting opinion. The other cases cited are not of this character, and have no bearing that we can see upon the facts of this case. So that, so far as appellants' motions are concerned, the court did not err in overruling them.

As to instructions given and refused: The first, second,

third, fourth, fifth, and sixth errors assigned under this head have been disposed of in what we have said on the merits of the case. Concerning the seventh assignment, it is claimed that the court erred in instructing the jury to the effect that paragraph two of the complaint states that said street is much traveled and used by the public and by teams and pedestrians, and at a point where such railway tracks of defendant cross the same, said street was so used by the public on the 29th day of September, 1908; that as one approached the railway crossing on said street on the east, the view of defendants' tracks to the south was obstructed by numerous buildings, structures and coal bunkers; that on the said 29th day of September, 1908, there were numerous box cars lying on said tracks, which with the other structures situated close to said track further obstructed plaintiff's view of said track to the south; and that said paragraph two of the complaint was admitted in defendants' answer, except the allegation of the same being dangerous, which was denied; and it is asserted by counsel that this instruction was wrong for the reason that many of the allegations are denied, viz., that there was a direct issue on the question of the obstruction; that there was no evidence whatever that the street was much traveled by teams and pedestrians, etc. The trouble with this assignment is that it assumes that the court made instructions which it did not intend to make, and in fact did not make. The instruction which is pertinent to the objection is as follows:

"It is further alleged that among the public streets south of said Denny Way and north of said Hanford street, as regulated by said ordinance, is a certain street known as Eagle street, and that the defendant crosses and passes over the surface of said Eagle street; that the said Eagle street is a public thoroughfare and that there are other railroad tracks thereupon, and that the said Eagle street, because of its proximity to business interests, is dangerous. Now, all this is admitted in the defendants' answer, except the allegation of the same being dangerous, which is denied."

So that the court, in telling the jury what portion of the second allegation of the complaint was admitted, did not tell it that the allegations that the track were obstructed or that the street was much traveled by teams and pedestrians was admitted by the answer. But it could only be gathered from such instruction that it was admitted by the answer that there was a certain street known as Eagle street; that the defendant crosses and passes over the surface of said Eagle street; that Eagle street is a public thoroughfare; and that there are other railroad tracks thereupon. These propositions were certainly not denied, and were not in issue in any manner in the trial of the cause.

The court instructed the jury that:

"Should you find . . . that the defendant company through any of its agents, and particularly the defendant Sheerer, . . . drove upon the plaintiff and injured him in the manner and form alleged in the complaint, then I charge you that such act would be negligence for which the defendants and each of them would be held to respond in damages in a sum not to exceed $7,533."

The reverse of this instruction was refused by the court. Conceding that this instruction was wrong, as applied to defendant Sheerer, it is not every wrongful instruction which will warrant a reversal of a cause. If it appears that the error was not prejudicial, the judgment will not be reversed, and neither of the defendants in this case could have been prejudiced by this instruction, for there was no question of negligence in the case excepting the negligence of the engineer. While it is true there was some testimony in relation to the position of the fireman at the time, and just before the time, when this accident occurred, it was conceded that the train was under the supervision and control of the engineer, and that the fireman was under his direct supervision and control so far as any of the issues in this case are concerned.

Assignment nine is that the court erred in instructing the jury that it was agreed by the attorneys in the case that the jury might see the location of the accident. In view of what

the record shows, this assignment is entirely without merit.

The tenth assignment is that the court erred in its instruction to the jury in using the phrase "if your verdict should happen to be for the defendants." This is not an exact statement of what the record shows. The statement of the court in that regard was as follows: "If your verdict should happen to be—if your verdict should be for the defendant company and Mr. Sheerer, you will just have your foreman sign," etc. In this connection the court was instructing the jury as to the form of its verdict. The court evidently discovered in dictating this instruction that it had probably used an unfortunate word, and corrected it by the unqualified remark, "if your verdict should be for the defendant company." It is a trifling objection at best, and if appellate courts should indulge in reversing judgments for every little slip of the tongue of a trial judge, or awkward or inapt expression that he might use, instead of aiding in the administration of justice, they would thwart its aim.

The other instructions given by the court and which are objected to properly stated the law, and the instructions asked and refused were either given in substance by the court or did not properly state the law, and it has been held by this court too many times to call for a repetition, that a party litigant is not entitled to an instruction in any particular form of words. An illustration of the contention so often made in this respect may be found in this record under assignment 16, which is to the effect that the court erred in refusing to give appellants' requested instruction No. 7, which reads as follows:

"You are instructed that a railroad track is in itself a signal of danger and that it is the duty of a person about to cross such a track to stop, look and listen for any approaching engine or train, where it will do any good, before going on the track. The law imposes this as a duty upon travelers crossing a railroad track, and if the plaintiff in this case failed to take these precautions, and if he could have seen or heard the defendant railway company's engine,

but failed to look and listen for it, he was guilty of negligence as a matter of law, and cannot recover for any injuries which he may have received, no matter how negligent the railway company may have been. If you believe that the plaintiff could not have seen the engine, but could have heard it; or if he could not have heard the engine, but could have seen it, and that he failed to make the attempt, then your verdict must be for the defendants."

The instruction given by the court on this branch of the case was as follows:

"I now charge you as the positive law well established in this state, that before a driver of horses, the plaintiff in this case, can cross a railroad track on a public street or highway, that it is his positive duty to know and realize that railroad crossings are a place of danger, and it is his duty to stop and look and listen for approaching trains or engines, and, if a train is approaching, to wait until such train or engine shall have passed, and if he fails to do this and comes into collision and an accident occurs, it is in law contributory negligence on his part and he has no cause for damages which can be maintained in any of the courts of this state against the defendant, no matter at what rate of speed the defendant company shall be driving its engine or cars, notwithstanding the ordinance hereinbefore mentioned and admitted in the pleadings. If you are in doubt respecting the matter that the plaintiff did stop, look and listen for approaching trains and engines and used the ordinary prudential care at the time of the accident, then I instruct you that your verdict should be for the defendant company and Sheerer and against the plaintiff."

Further comment on this assignment seems to be unnecessary.

There appearing to be no prejudicial error in the case, the judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and CROW, JJ., concur.

[No. 8208. Department Two. November 13, 1909.]

EDWIN H. FLUECK, *Appellant*, v. GEORGE PEDIGO *et al.*, *Respondents*.[1]

JUDGMENT—RES JUDICATA—DENIAL OF MOTION TO VACATE—BAR. An order denying a motion by parties not served to vacate a tax foreclosure judgment, void because taken without notice and by mistake, heard on the merits and not appealed from, is *res judicata* and a bar to a subsequent action by one claiming under such parties, to the extent of their interests; and it is immaterial that the motion to vacate was upon a special appearance or that the defect rendered the judgment void.

TAXATION—FORECLOSURE—SUMMONS—FORM. An individual tax foreclosure and deed is void as to an owner of a one-sixth interest, and his successor, where there was no personal service and the summons for publication required an appearance within sixty days after service of the summons.

ABATEMENT AND REVIVAL—ANOTHER ACTION PENDING—PLEA—DISMISSAL OF FIRST ACTION. A motion to vacate a judgment cannot be pleaded in abatement of another action for the same cause, where the motion was dismissed on stipulation without prejudice before the plea in abatement was filed.

ADVERSE POSSESSION — COLOR OF TITLE — TAX CERTIFICATE OF DELINQUENCY. A tax title claimant cannot claim adverse possession and the payment of taxes for seven successive years, prior to seven years after the date of the tax deed, by the taking of possession under the certificate of delinquency before the sale; and Laws 1897, p. 182, § 95, subd. 4, making the certificate of the same effect as a judgment does not make the certificate color of title or give the right to possession, the same being merely a legislative definition of the nature of the lien, in view of the next section requiring judgment and sale.

EJECTMENT—IMPROVEMENTS. In ejectment, recovery cannot be had for improvements prior to the betterment law of 1903.

Appeal from a judgment of the superior court for King county, Morris, J., entered March 24, 1909, upon findings in favor of the defendants, in an action to recover land sold for taxes, after a trial on the merits before the court without a jury. Affirmed in part and reversed in part.

[1]Reported in 104 Pac. 1119.

William B. Bebb and *E. H. Flueck* (*Walter G. Loewe*, of counsel), for appellant.

S. D. King, for respondents.

RUDKIN, C. J.—On the 7th day of May, 1900, the county treasurer of King county issued to the defendant George Pedigo a certificate of delinquency for unpaid taxes on lots 1, 2, 3, 4, and 5, of Block 64, of Riley's Addition to Riley's Addition to South Seattle, for the years 1891 to 1895 inclusive. On the 23d day of June, 1900, Pedigo instituted proceedings in the superior court of King county to foreclose the certificate, and such proceedings were had therein that a default judgment of foreclosure was entered on the 31st day of August, 1900. A sale was made under this judgment by the county treasurer, and a tax deed issued to Pedigo as purchaser on the 15th day of September, 1900. At the time the tax foreclosure was instituted, Annie L. Fuller, widow of L. C. Fuller, deceased, Mabel Fuller Rossiter, Lena Fuller Beckwith, and John A. Slavin, were the owners of the property affected by the foreclosure. There was no personal service on the defendants in the foreclosure, and no appearance by them, and the published summons or notice was void under the decision of this court in *Thompson v. Robbins*, 32 Wash. 149, 72 Pac. 1043, and numerous later cases.

On the 3d day of June, 1903, the widow, Annie L. Fuller, Mabel Fuller Rossiter, and Lena Fuller Beckwith interposed a motion to vacate the tax judgment on the ground that the judgment was taken without their knowledge, and through their mistake, inadvertence, surprise, and excusable neglect, and on the further ground that the court had no jurisdiction of the subject-matter of the action or of the person of the defendants. This motion was denied, after a full hearing on the merits, on the 14th day of July, 1903, and a further motion to reconsider was denied on September 26, 1903. An appeal from the two last mentioned orders was prosecuted to

this court, but the appeal was dismissed because not taken within the time limited by law. *Pedigo v. Fuller*, 37 Wash. 529, 79 Pac. 1129. On July 9, 1907, the appellant Flueck, as successor in interest to the Fullers and Slavin, interposed a second motion to vacate the tax judgment, but by stipulation of all parties concerned this motion was afterwards dismissed without prejudice. On the 27th day of July, 1907, the present action was instituted to vacate the same judgment, and to quiet title to the property affected thereby. The defendants had judgment below, and the plaintiff appeals.

As to the undivided five-sixth interest in the property acquired by the appellant from Annie L. Fuller, Mabel Fuller Rossiter, and Lena Fuller Beckwith, the judgment must be affirmed, for the reason that the order denying the motion to vacate the tax judgment is *res judicata*. In the case of *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. 955, it was held that our statute affords a full, complete, and adequate remedy against an illegal judgment by authorizing the aggrieved party to proceed by motion to vacate and set aside, and permitting an appeal from an order entered on such motion, and that one who has attacked a judgment by motion to vacate, and has failed to prosecute an appeal from a denial of his motion, cannot subsequently maintain an action to cancel the judgment, since the question of the validity of the judgment is *res judicata*. The doctrine announced in that case was reaffirmed in *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Pierce County v. Bunch*, 49 Wash. 599, 96 Pac. 164, and in the recent case of *Meisenheimer v. Meisenheimer, ante* p. 32, 104 Pac. 159, and has become the settled law of this state.

The appellant seeks to distinguish these cases from the case at bar on two grounds: First, because the appearance of his predecessors in interest in support of the motion to vacate the tax judgment must be deemed a special appearance; and second, because the original judgment was void.

We deem it unnecessary to inquire whether the motion to vacate the tax judgment constituted a general or a special appearance in that proceeding, because the moving parties invoked the jurisdiction of the court to vacate the judgment and the order denying the motion is necessarily binding upon them. It is folly to claim that a party is not bound by an order denying relief which he himself prays for. The moving parties were before the court demanding relief, the court had full and complete jurisdiction of the subject-matter and the parties, and its decision is final until reversed, or set aside in some appropriate proceeding authorized by law. Nor does the fact that the original judgment was void change the rule. As well might it be claimed that the appellant may institute another action for the same relief upon the affirmance of the judgment appealed from. It is the order denying the motion to vacate that works the estoppel, and not the original judgment. The court does not hold the original judgment valid, but holds the parties estopped to challenge its validity.

On the other hand, the appellant seems entitled to the relief prayed for as to the undivided one-sixth interest acquired from Slavin. As to him, the tax judgment was void and nothing has transpired since to estop either him or his successor in interest from moving against it. The answer pleads the pendency of the motion to vacate, interposed by the appellant, in abatement of the present action, but the answer itself shows that the first motion was dismissed without prejudice before the answer was filed. The plea in abatement was therefore insufficient. 1 Ency. Plead. & Prac., p. 773.

Respondents also claimed title by adverse possession for seven successive years under claim and color of title made in good faith accompanied by the payment of taxes, but this defense is not sustained. Less than seven years elapsed between the date of the tax deed and the commencement of the present action. The respondents attempt to tack to their possession under the tax deed their possession under the

certificate of delinquency before foreclosure, contending that the certificate itself is color of title under subdivision 4, §95 of the laws of 1897, p. 182, which provides that, "Such certificate shall have the same force and effect as a judgment execution and sale of and against the premises included therein." The meaning of this provision is not entirely clear, but it must be construed as a legislative definition of the nature and extent of the tax lien, and nothing more. The very next section of the act provides for a foreclosure of the certificate and a judgment and sale, so that the preceding section cannot be given the force and effect claimed for it. A certificate in and of itself gives the holder no right to the possession of the property therein described, and cannot be made the basis of an adverse claim.

All improvements on the property were made prior to the passage of the betterment act of 1903, so that we are not concerned with these in the final disposition of the case.

The judgment is reversed, with directions to enter judgment in favor of the appellant for an undivided one-sixth interest in the property, upon payment of his pro rata proportion of all taxes paid by the respondents, with interest. The appellant will recover his costs in this court.

CROW, MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8348. Department Two. November 15, 1909.]

JOHN C. WILSON, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

STREET RAILROADS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN—QUESTION FOR JURY. The driver of a team is not guilty of contributory negligence, as a matter of law, in starting across an electric railway crossing, where he saw a car that had just passed him standing at a station 230 feet away, the indications being that it would continue in the same direction, and he supposed he was crossing the track behind it, when it started back; and in such a case the plaintiff is not required to stop, look and listen before driving on the track, but it is the duty of the company to have the car under control.

Appeal from a judgment of the superior court for King county, Tallman, J., entered April 1, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained at a railway crossing. Affirmed.

Morris B. Sachs, for appellant.

Jackson Silbaugh, for respondent.

MOUNT, J.—On February 19, 1908, the respondent was injured in a collision between a street car operated by appellant and a wagon and team of horses driven by respondent. An action brought against the railway company for personal injuries resulted in a judgment in favor of the plaintiff for $3,000. The defendant appeals from that judgment, and argues that the trial court erred in denying appellant's motion for a nonsuit, in giving certain instructions, and denying a motion for new trial upon the ground that the verdict is excessive.

It appears that, about 7:30 o'clock, on the evening of February 19, 1908, respondent was driving a heavy wagon along the shore of Lake Washington, upon a plank roadway

[1]Reported in 104 Pac. 1112.

sixteen feet wide. The street railway followed closely along this roadway, crossing it at a point known as Weed station, and again at Oberlin street. At this latter place, the car line crosses the roadway at an angle, following the roadway ninety feet in order to cross the same. From Oberlin crossing the car line proceeds on to Rainier Beach station. There is a slight curve between Oberlin crossing and Rainier Beach station. The distance between each two of the points named is about two hundred and forty feet.

When respondent came up to Weed station, he crossed the street car track in front of appellant's car, which was stopped at that point permitting passengers to alight. At that time the car and respondent were headed in the same general direction. The car was outward bound from Seattle. The car soon thereafter passed respondent and crossed Oberlin street ahead of him and proceeded on to Rainier Beach station. The car was standing at the latter place when respondent reached Oberlin street. Respondent, thinking that the car would go ahead beyond that point, attempted to cross over the tracks. The car, instead of going beyond Rainier Beach station, immediately started back towards Seattle, and ran into the wagon respondent was driving, injuring the respondent and destroying the wagon.

The respondent was familiar with the road, and with the operation of the cars at that place. He knew the place of crossing and the distances between the stations. The car track was a single track, and was operated by a block system at those points. When a car came into the block, a light was turned on indicating that the car was going out. When the car arrived at the end of the block which was beyond Rainier Beach station, another light was turned which would indicate that the car was coming back. These lights were for the use of the railway company to protect cars against each other, but respondent was acquainted with the method of their use, and testified that, when he came to Oberlin crossing, he saw the car about two hundred and

thirty feet away at Rainier Beach station, standing still; that he saw the light indicating that the car was going on to the end of the block, and that the other light indicating an approaching car was not burning. He thereupon started to cross the track which, on account of the diagonal position of the track upon the street, required him to travel about sixty-two feet in order to clear the track. After he started to cross the track, he saw the car coming toward him. He called to the motorman and attempted to get out of the way, but failed to do so. The car struck the wagon in the middle, injuring the respondent and damaging the wagon and team. There was a slight curve in the track between Oberlin street and Rainier Beach station. Respondent testified that he did not know the car was coming toward him until it was within about one hundred feet of him, and there is disputed evidence that the car was running at from twenty to twenty-five miles per hour at the time it struck respondent's wagon. There was also evidence to the effect that the motorman could have seen the respondent upon the track in ample time to have stopped the car before running him down.

Appellant argues that, respondent knowing the distances he would have to travel in order to make the crossing, and knowing that the car was coming toward him or would soon be coming back, he was guilty of negligence in attempting to make the crossing ahead of the car. Appellant relies upon the following cases in support of that position: *Criss v. Seattle Elec. Co.*, 38 Wash. 320, 80 Pac. 525; *Coats v. Seattle Elec. Co.*, 39 Wash. 386, 81 Pac. 830; *Davis v. Couer d' Alene & Spokane R. Co.*, 47 Wash. 301, 91 Pac. 839; *Snowdell v. Seattle Elec. Co.*, 54 Wash. 323, 103 Pac. 3.

The last case cited clearly distinguishes this case from the previous cases, and is in point here to the effect that, where a person sees a car coming at an ordinary rate of speed, in a busy street in a populous city, on an up-grade, half a

block away, he is not guilty of contributory negligence, as a matter of law, in assuming that he may cross a street ahead of the car. In this case the car was two hundred and thirty feet away from the respondent. It was standing at a station. The indications were that the car was going away from respondent, when he started to make the crossing. These facts make an entirely different case from one where a person drives in front of a moving car which he knows, or ought to know, is coming upon him, and which in all probability will be unable to stop. It is claimed by the appellant that, because the respondent could see the car, he was bound to know that it was coming toward him. It is true that he could see it, but at the time he started to cross the track, he did not know that it was on its way toward him and the indications were that it was going away from him. While he was on the crossing he probably could have seen the car, but the evidence is that after he had started upon the crossing he could not recede; his only escape was to go ahead, and before he could clear the crossing he was run down. In such cases it is the duty of the company to maintain control of the car and be able to stop. There was, therefore, no error in denying appellant's motion for a directed verdict.

After the court had instructed the jury to the effect that it was respondent's duty to stop, look, and listen before attempting to cross a track, the instruction continued as follows:

"But if you find that the car which struck the wagon and team which plaintiff was driving was standing still at the time when plaintiff started to drive across the car track of the defendant, then in that event plaintiff was not required as a matter of law to stop and listen before starting to drive across said car track, unless you find that the conditions surrounding said car and the acts and conduct of those in charge of said car were such as to indicate to an ordinarily careful and prudent person that said car was in the act of starting and was about to start."

Counsel argues that the instruction to the effect that, if the jury found that the car was standing still when respondent started to cross the car track, then respondent was not required to stop and listen unless the surroundings indicated that the car was about to start, was erroneous. We think there is no error in this instruction. If the car was in sight but was stopped, or was far enough away so that a reasonably careful person would conclude that he might cross in safety, respondent was not guilty of negligence. Respondent had a right to cross the railway at that point. It was a public way. It was his duty to give way to a car which was approaching so near that a reasonably careful person would not attempt to cross in front of it. It was likewise the duty of the appellant to have the car under reasonable control at such places. The duty of the respondent to look and listen was satisfied when he saw the car, and the surroundings indicated that it was stopped or was not coming upon him, and that a reasonably careful person might cross in safety.

It is next argued that the verdict is excessive by reason of the fact that there was no permanent injury proven. The evidence of the doctors was conflicting upon this point. After reading the evidence, we are of the opinion that it is not so excessive as to justify a reduction.

The judgment is therefore affirmed.

RUDKIN, C. J., CROW, DUNBAR, and PARKER, JJ., concur.

[No. 8347. Department Two. November 15, 1909.]

ROY N. WILSON, *Respondent*, v. SEATTLE, RENTON & SOUTHERN RAILWAY COMPANY, *Appellant*.[1]

DAMAGES—INJURY TO HORSE—MEASURE OF DAMAGES. The measure of damages for injury to a horse is the diminished market value after cure, and expense in reasonable attempts to effect a cure, with reasonable compensation for loss of use, provided the whole damages do not exceed the original value of the horse.

PLEADING—AMENDMENT TO CONFORM TO PROOF. It is not error to allow the complaint to be amended to conform to proof increasing the damage claimed for injury to a horse, where there was no motion to strike the evidence or claim of surprise or demand for time to meet the amendment.

DAMAGES—TO PERSONAL PROPERTY—EXCESSIVE VERDICT. A verdict for damages for injury to personal property is not excessive where there was no dispute as to the items, which were all within the measure of damages allowable.

Appeal from a judgment of the superior court for King county, Gay, J., entered March 20, 1909, upon the verdict of a jury rendered in favor of the plaintiff, in an action of tort. Affirmed.

Morris B. Sachs, for appellant.

Jackson Silbaugh, for respondent.

MOUNT, J.—Respondent brought this action to recover damages resulting to a wagon and horses and load, by reason of a collision between the wagon and one of appellant's cars. Plaintiff recovered a judgment for $440. Defendant appeals.

The action arises out of the same accident, and is based upon the same facts, as stated in *Wilson v. Seattle, Renton & S. R. Co.*, *ante* p. 651, 104 Pac. 1112. The plaintiff in this case is the owner of the wagon, team, and load, and is a brother of the driver who was injured in that case. In addition to the points there discussed, the appellant argues

[1]Reported in 104 Pac. 1114.

here that the trial court erred in ruling that evidence was admissible to show the market value of an injured horse before and after the injury, and for loss of services of the horse by reason of the injury, and for services of a veterinary surgeon in attending the horse; and in instructing the jury, in substance, that the measure of damages, in case they found in favor of the plaintiff, was the depreciation of the market value, together with the necessary expense of caring for the horses, and loss of hire or reasonable use of the horse during the time it was rendered useless, providing the whole did not exceed the original value of the horse. It is argued by the appellant that depreciation in market value covers the whole loss, and that, when in addition to that is added loss of use, the court permits a double recovery. No authorities are cited by the appellant upon this point.

The authorities cited by the respondent, and others which we have been able to find, indicate that the measure of damages in cases of injury to domestic animals is that "the owner is entitled to recover for the diminished market value of the animals after cure, so far as a cure was effected, and, in addition thereto, such expense as he incurred in reasonable attempts to effect a cure, and a reasonable sum or compensation for the loss of the use of the horses while under treatment, provided the whole damages do not exceed the original value of the property." *Keyes v. Minneapolis & St. Louis R. Co.*, 36 Minn. 290, 30 N. W. 888, and cases there cited.
See, also, *Ellis v. Hilton*, 78 Mich. 150, 43 N. W. 1048, 18 Am. St. 438, 6 L. R. A. 454; *Telfair County v. Webb*, 119 Ga. 916, 47 S. E. 218; *Gillett v. Western Railroad Corporation*, 90 Mass. 560.

This rule limits the recovery for an injured animal to the original value of the animal. Such recovery may not exceed that amount. Thus limited, the rule seems just. If the injured animal was worth $350 before his injury, and $50 afterwards, the direct depreciation is $300. If the owner was

compelled to expend $50 or more on account of the injury, his loss was clearly the original value of the animal, and a recovery for that amount cannot be said to be a double recovery. The court did not err, therefore, in the respects claimed.

The original complaint alleged the depreciation in the value of the horse at $200. The evidence tended to show such depreciation at $300. After the close of the evidence, the court permitted the plaintiff to amend the complaint so as to allege the latter amount. Appellant now bases error thereon. The evidence was in the record. There was no motion to strike it, and it was within the discretion of the court to allow the amendment. If the appellant had been misled or had demanded time to procure evidence to meet this amendment, he might now be heard to complain. In the absence of such demand, the court did not err.

It is also claimed that the verdict of the jury was excessive. The trial court made a reduction of $50 in the amount of the verdict returned by the jury, and entered a judgment for $440. There is substantially no dispute in the evidence as to any item except the reasonable use of the horse for twenty days, alleged at seven dollars per day. The evidence shows that the horse was worth $350 before the accident, and $50 afterwards; that respondent paid $25 for the services of a veterinary surgeon; that the damages to the wagon were $75; to the harness $10, and to the load $5. So that, if any amount was allowed for the use of the horse, it could not have exceeded $25, which, added to the expense for the doctor and $300 depreciation in value, did not exceed the original value of the horse. It was, therefore, not excessive.

The judgment is therefore affirmed.

RUDKIN, C. J., DUNBAR, CROW, and PARKER, JJ., concur.

[No. 8122. Department One. November 15, 1909.]

THE CITY OF SEATTLE, *Respondent*, v. SYLVESTER-COWEN INVESTMENT COMPANY, *Appellant*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS — REDUCTION—PROPERTY AFFECTED—STATUTES — CONSTRUCTION. Under Laws 1907, p. 316, § 28, providing that on confirmation of an assessment of property for local improvements, default "may" be entered as to the property of noncontesting owners, "may" should not be construed to mean "must," in view of other provisions of the statute authorizing the court to apportion part of the cost of the improvement to the city, and to change any assessment or recast the same according to the "principles" of the act, which appear to require each parcel of land to "bear its relative equitable proportion" of the costs.

SAME—EXCESSIVE ASSESSMENTS — APPEAL — REVIEW. An assessment ordered by the court against property benefited by a local improvement will not be reduced as excessive unless the evidence so clearly preponderates against the finding as to indicate arbitrary action.

SAME—ORDINANCE—VALIDITY—TITLE—LEGALITY OF OBJECT — CONSTRUCTION. An ordinance entitled an ordinance to provide for laying out and establishing streets and "parkways" and levying assessments against the property benefited, the city to bear the expense not levied against property benefited, is not void by reason of including parkways for which no assessment could be made on private property, where private property was not sought to be assessed for the parkways, which were procured thereunder by private treaty at the expense of the city.

SAME—TITLE—DUPLICITY. An ordinance entitled an ordinance providing for the laying out, extending, etc., of certain streets as highways, boulevards and parkways, and for the condemnation of land therefor, is not void in that it embraces more than one subject, viz., condemnation (1) for streets and (2) for parkways; since it all relates to one general subject—the condemnation of land for a public use.

Appeal from an order of the superior court for King county, Albertson, J., entered November 11, 1908, confirming an assessment roll for a local improvement, after a hearing on the merits. Affirmed.

[1]Reported in 104 Pac. 1121.

Bamford A. Robb, Carkeek & McDonald, O. A. Tucker, and *Leroy L. Todd,* for appellant.

Scott Calhoun and *King Dykeman,* for respondent.

Gose, J.—The city of Seattle, by Ordinance No. 15,924, entitled,

"An ordinance providing for the laying out, widening, extending and establishing of Meadow Place, University Boulevard and East Seventieth Street, as public streets, highways, boulevards and park ways in the City of Seattle, between East Green Lake Boulevard and Fifteenth Avenue Northeast, over and across certain lots, blocks, tracts and parcels of land in said city, and providing for the condemnation and appropriation to the public use as a park of certain other lands and premises adjoining and proximate thereto, and providing for the taking and damaging of land and other property necessary therefor, and for the ascertainment and payment of the just compensation to be made for the private property to be taken or damaged for said purpose, and for the assessment of a just and equitable proportion of said compensation and of the necessary expenses upon the private property benefited, and providing for the payment of the remainder of said compensation and other necessary expenses from the general fund of the City of Seattle";

provided for the laying out, widening, extending and establishing of Meadow Place, University boulevard, and East Seventieth street, as public streets, highways, and boulevards in the city, and provided for the condemnation and appropriation to the public use of other contiguous land as a park. During the pendency of the proceeding, the property sought to be appropriated for park purposes was acquired by the city at private treaty. A trial was had for the purpose of ascertaining the compensation to be made for the property taken and damaged. Thereafter the board of eminent domain commissioners, to whom the matter was referred, prepared and filed an assessment roll, for the purpose of creating a fund with which to pay the damages awarded for the taking of the land for street purposes. The appellant in due time filed written objections to the assessment, raising numerous

questions touching its validity, all of which save one the court overruled, reduced the assessment against private property to the extent of $14,500, assessed this additional sum against the city, and entered a judgment confirming the assessment thus modified. From this judgment, an appeal has been taken.

The first point urged is that the court erred in giving the nonobjecting property owners their proportionate benefit of the reduction. The proceeding was based on the Laws of 1907, p. 316. The trial court observed, in passing on the question, that it would be unfair to reduce the assessment of one property owner without making a corresponding reduction in favor of the other property owners similarly situated, and that the reduction would be proportionate upon all property in the assessment district. It is contended that, under section 28 of the statute, which provides that "as to any property to the assessment of which objections are not filed as herein provided, default may be entered and the assessment confirmed by the court," it was the duty of the court to enter a judgment against all noncontesting property owners. The familiar rule of construction is invoked that, where a statute provides for the discharge of a public duty, the word "may" is construed to be mandatory.

While conceding this to be a general rule of construction, we must not be unmindful of another canon which requires that an act must be construed as an entirety for the purpose of discovering its intent and purpose. Section 23 of the act enjoins upon the commissioners the duty to estimate what proportion, if any, of the total cost of the improvement will be a benefit to the public, and what proportion thereof will be a benefit to the property benefited, "and apportion the same between the city and such property so that each shall bear its relative equitable proportion." Section 24 requires the commissioners to certify the assessment roll to the court before which the proceeding is pending. Section 25 provides that, after the return of the assessment roll, the court shall

make an order setting a time for the hearing, notice of which shall be given by the commissioners to each owner of property assessed. Section 27 provides that "the court shall retain full jurisdiction of the matter until final judgment on the assessments." Section 29 provides that the court shall have authority, at any time before final judgment, to modify, alter, change, annul, or confirm any assessment returned, or cause it to be re-cast by the same commissioners, or may appoint other commissioners in place of all or any of the commissioners first appointed, to the end that justice may be attained, and may make all orders necessary to a true and just assessment of the cost of the improvement according to the *principles* of the act, and may from time to time continue the hearing as to the whole or any part of the premises.

A reading of these several provisions discloses the "principles" of the act to be that each tract or parcel of land benefited "shall bear its relative equitable proportion" of the cost of the improvement. The court is given jurisdiction of the entire matter until final judgment, and is clothed with broad equitable powers, and we fully agree with the learned judge that a denial to the non-contestants of an equitable proportion of the reduction would have been manifestly wrong and unfair. We conclude that in this respect the court acted within the power conferred by the statute. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279, cited in support of the appellant's contention, states that the action of this court only affects the property of the parties who appeal. Obviously so, as the final judgment of the lower court is conclusive upon all who are content to accept it.

It is next urged in effect that the court did not sufficiently reduce the assessment against private property, and figures are presented which it is contended disclose the court's error. It is said that the court found that one-half of the improvements should be assessed to the city, and that upon this basis a larger reduction should have been made. After a somewhat lengthy colloquy between court and counsel as to the

basis upon which the reduction should be made, the corporation counsel requested the court to fix a definite sum to be charged against the general fund of the city, stating that counsel would not be able to agree; whereupon the court said, "The order is that the sum of $14,500 be paid by the city." This was in addition to the assessment theretofore made by the commissioners against the city. The judgment speaks to the same effect. The damages were assessed on the basis of the street having a width of one hundred and sixty feet. Section 2 of the act provides that, where a street is established or widened to a width greater than one hundred and fifty feet, the excess over that width shall be paid out of the general fund of the city without any reduction for benefits of such excess. The commissioners assessed the city $10,000 for the excess. We will not disturb the findings of the lower court as to what the proper assessment should be, except when it appears that the evidence is so clearly preponderating against the finding as to indicate that it acted arbitrarily. *In re Third, Fourth and Fifth Avenues*, *ante* p. 519, 104 Pac. 799. Measured by this rule, the judgment was without error in this respect.

Finally, it is urged with much earnestness that the ordinance is void for duplicity, under section 10 of the city charter, which provides that: "Every ordinance . . . shall contain but one object, which shall be clearly expressed in its title;" and secondly, because section 4 of the ordinance directs an assessment upon private property to pay the damages awarded, and that such an assessment cannot be made for the purpose of establishing parks or parkways. The last contention may be dismissed with the statement that no assessment was made against private property for the appropriation of parks or parkways, but, as we have seen, the property desired for a park was purchased by the city. Moreover, section 4 provides that "any part of the compensation, damages or costs that is not finally assessed against said property shall be paid from the general fund of the city." Section

2 of the statute provides that special assessments shall only be levied for certain enumerated purposes, not including public parks. The ordinance as an entirety does not disclose any intention to levy special assessments for any purpose not authorized by the statute.

It is asserted that the ordinance discloses two distinct objects, (1) condemnation of certain property for public streets, highways, and parkways; and (2) condemnation of certain other property for a park; and that these objects are diverse and incongruous and have no relation to or connection with each other. If the postulate be accepted, the conclusion would follow. We think that both the title and the body of the ordinance make it clear that there is but a single general object, viz., the condemnation of land for a public use. The charter provision does not forbid the lawmaking body from passing an ordinance having a general object, and it may bring within its scope any number of sub-subjects germane to the general subject. Whatever is legitimately connected with a unified subject may be embraced in a single title or act. We have said by way of argument and of illustration that the entire subject of pleadings could be treated under a title in relation to pleadings, and also that an entire code of civil procedure would be germane to the title "An act to provide for a code of civil procedure." Stated in another form, the lawmaking body may make the object as comprehensive as it sees fit, provided it relates to one general relevant and connected subject. The provision invoked was adopted as a shield to prevent the union of diverse, incongruous, and disconnected matters, but it cannot be used as a sword to strike down useful legislation not within the mischief sought to be avoided. *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *Weed v. Goodwin*, 36 Wash. 31, 78 Pac. 36. The ordinance provides for the condemnation of land for streets and parks, for an assessment upon property specially benefited, to "be made in the manner provided by the laws of the state for the purpose of raising the just and equitable proportion to be as-

sessed upon private property," etc.; and, as we have stated, "that any part of the compensation, damages or costs that is not finally assessed against said property shall be paid from the general fund of the city." These are but the details for carrying out the general object of condemning property for a public use. Correctly interpreted, the ordinance means that the property benefited shall bear the cost that may be legally imposed upon it, and that the balance of the expense shall be borne by the city.

The judgment will be affirmed.

RUDKIN, C. J., FULLERTON, CHADWICK, and MORRIS, JJ., concur.

[No. 8095. Department Two. November 15, 1909.]

FRED W. WOLF COMPANY, *Respondent*, v. NORTHWESTERN DAIRY COMPANY, *Appellant*.[1]

SALES—ACCEPTANCE—TEST TO DETERMINE—PLEADING—ISSUES. In an action for the price of an ice making plant sold under a contract providing for a specified test to determine whether the plant was up to the guarantee, and that at such time the plant should be either rejected or accepted, acceptance to be conclusive and a complete discharge, an answer denying performance according to the guarantee raises no issue, where its effect is offset by admissions showing the performance of the work, a satisfactory test, and an unqualified acceptance by the defendant.

SAME— WARRANTY—BREACH—EFFECT OF ACCEPTANCE. In such a case, a breach of warranty, due to a latent defect not discovered until after the test and acceptance, is no defense or ground for counterclaim, in the absence of fraud.

SAME—PLEADINGS—ANSWER—JUDGMENT ON PLEADINGS. Where the material allegations of a complaint on contract of sale are admitted by the answer, and an alleged breach of warranty set up as a counterclaim is defeated by the admitted acceptance of the work pursuant to a stipulated test whereby the guarantee was to be determined within a time limited, it is proper to enter judgment for the plaintiff on the pleadings, it not appearing that any amendment to the answer could be made, or that leave therefor was asked.

[1]Reported in 104 Pac. 1123.

Appeal from a judgment of the superior court for King county, Warren, J., entered November 24, 1908, in favor of the plaintiff, upon the pleadings, in an action on contract. Affirmed.

Byers & Byers, for appellant.

Kerr & McCord (*L. V. Newcomb*, of counsel), for respondent.

PARKER, J.—This is an appeal from a judgment rendered upon the pleadings in favor of the plaintiff. By the complaint it is alleged, in substance, that on September 23, 1905, defendant entered into a written contract with plaintiff, by the terms of which defendant purchased from plaintiff an ice-making and refrigerating plant, of twenty tons refrigerating capacity, consisting of the machinery and materials specifically detailed and set forth in the contract, which plant was by plaintiff furnished, installed, and completed in all things in accordance with the terms and conditions of the contract, a copy of which is attached to the complaint, by which it appears to have been executed October 6, 1905, and among other things contains the following:

All necessary pipe, fittings and hangers for the direct expansion of ammonia for the proper cooling of the following rooms will be furnished:

One storage room	24′ x 15′ x 9′ 6″ 32°
One ice storage room	14′ x 15′ x 9′ 6″ 28°
One ice cream stg. room	11′ x 15′ x 9′ 6″ 14°

This piping will be placed in the ceiling of the above rooms and will be guaranteed to maintain the temperatures required. . . . .

And we agree that this machine when properly operated and connected to an electric power plant of ample capacity, will have a refrigerating duty equal to the melting of 20 tons of ice during 24 hours of continuous operation at 70 R P M. . . . .,

CAPACITY. We further guarantee that this machine will include an ice-making capacity of 5 tons every 24 hours, besides doing all the necessary work, with a continuous run of 21 hours daily . . .

After the plant is started we will furnish an engineer to have charge of its operation for 10 days, during which time we will do the work and produce the guaranteed results herein specified. While we are in charge you are to furnish all necessary help, together with

fuel, light, water, steam, oil waste and all other necessary supplies for the successful operation of this plant. At the end of the above mentioned 10 days you shall accept or reject the plant, it being understood, however, that if the conditions of this proposition be fulfilled the plant shall be accepted. If rejected, you shall notify us in writing thereof and hereby permit us to enter the premises and remove our equipment without charge to you and upon refunding to you whatever money has been paid us. An acceptance after the above mentioned period shall be in full discharge of all agreements hereinbefore contained.

that on January 11, 1906, the plant having been fully installed and tested for the period of ten days as required by the contract, the defendant accepted the same in writing as follows:

Seattle, Wn., Jan. 11th, 1906.

The Fred W. Wolf Company,
Chicago, Ills.,
Gentlemen:—

This is to certify that the twenty ton refrigerating plant, including a five ton ice-making and direct expansion piping for room, has been erected in a proper manner and that the machine is giving every satisfaction. We hereby render this as an acceptance of the contract which was entered into with you on October 6, 1905.

Yours truly,
Northwestern Dairy Company,
(Signed) per J. C. Burnam.

that the agreed purchase price of the plant was $5,750, payable twenty-five per cent at time of acceptance, twenty-five per cent twenty days after acceptance, twenty-five per cent sixty days after acceptance, and twenty-five per cent ninety days after acceptance; and that defendant has made all payments as they fell due, save the last one falling due ninety days after acceptance, being April 11, 1906, for which judgment is prayed, with interest from that date.

By its answer, defendant denies the allegations of the complaint as to plaintiff's compliance with the terms of the contract, but admits the making of the contract and admits that it executed the written acceptance, and "alleges that said writing was signed under a mistake of fact in this that the defendant supposed that the plant erected by the plaintiff would maintain the temperature warranted by plaintiff and

that the plant would be of the capacity warranted by plaintiff," and that it relied on the warranty in plaintiff's contract. Defendant denies it is indebted to plaintiff in the sum claimed or in any sum. For an affirmative defense, and counterclaim, defendant alleges and prays judgment as follows:

"That at the time the said plaintiff completed the construction of said refrigerating and ice making plant which was in the month of January, 1906, the said plant would maintain the temperatures named and this defendant supposed that the temperatures would be maintained by said plant during the summer months and supposed that the said plant was of the capacity of twenty tons daily and shortly before April 11th, 1906, defendant discovered that said plant was not coming up to the warranty of plaintiff and defendant thereupon refused to make another payment until the plant should be thoroughly tested, but this defendant was not able fully to discover that said plant would not do the work which it was warranted to do and that it was not of the capacity of twenty tons daily until about the month of July, 1906, and thereupon this defendant notified the plaintiff, and the plaintiff by its agent, George L. Clayton, with whom all the deals between plaintiff and defendant were had, and to whom all payments were made, at divers and sundry times during the summer of 1906, and during the year 1907, endeavored to make said plant produce said refrigerating capacity and to maintain the temperatures of said premises as warranted by said plaintiff and the said plaintiff was totally unable to make said plant come up to its warranty, and this defendant has since and during said time given the said plant a thorough test and said plant as constructed by the plaintiff is not of the capacity of twenty tons refrigeration daily and would not and will not maintain the temperatures of said premises during the summer months as warranted by the plaintiff to the great loss and damage of the defendant.

"That by reason of the failure of said plant as erected by the plaintiff to maintain the temperatures of said premises as guaranteed, and by reason of its failure to maintain the refrigerating capacity warranted by plaintiff, this defendant has suffered great loss and damage and has been compelled to hire experts to put the machinery in proper shape and was for two summers deprived of the use of the plant

which it had contracted for and thought had been erected by reason of endeavoring to make the said plant do the work which it had been guaranteed to do by the plaintiff to the loss and damage of the defendant in the sum of three thousand ($3,000).

"Wherefore, this defendant prays that it may go hence without day and recover of and from the plaintiff the sum of fifteen hundred sixty-two and 52-100 ($1,562.52) dollars, together with the costs and disbursements of this action."

Plaintiff moved for judgment upon the pleadings in accordance with the prayer of its complaint, which the court granted, and entered judgment accordingly; from which defendant has appealed to this court.

The principal questions presented are upon the sufficiency of the answer as a defense and counterclaim. (1) Do the denials of the answer, taken in connection with the admissions as to the contract and acceptance, tender any issue? (2) Do the facts affirmatively pleaded, taken in connection with the admissions as to the contract and acceptance, constitute a defense or counterclaim?

Learned counsel for appellant contend, "That the denials of the answer alone were sufficient to preclude any judgment on the pleadings." It is true that the answer in form denies respondent's compliance with the contract, and in form denies that it is indebted to respondent; but the effect of these denials is entirely destroyed by the admitted terms of the contract, the admitted acceptance of the plant and the failure to plead payment. It seems to us the principal announced by this court in *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767, shows that these denials, taken in connection with the admissions, do not tender any issue, and, so far as the denials alone are concerned, leave the material allegations of the complaint unanswered. That was an action to recover the amount due upon a judgment rendered in another state. The allegations of the complaint being in usual form, and sufficient to state a cause for recovery, the answer admitted the facts pleaded, but denied there was any money owing

upon the judgment; and then set up an affirmative defense. Speaking of the effect of such a denial by defendant, the court at page 663, said:

"He controverts the mere conclusion drawn by the pleader from the facts stated, and 'denies that there is any money due and owing to the said plaintiff on any judgment whatever obtained by said plaintiff against said defendant.' This is not such a denial as is contemplated by the statute, and it puts in issue no fact alleged. *Lightner v. Menzel*, 35 Cal. 452; *Nelson v. Murray*, 23 Cal. 338; *Buller v. Sidell*, 43 Fed. Rep. 116; *Watson v. Lemen*, 9 Col. 200 (11 Pac. Rep. 88). The denial of indebtedness is merely a denial of a legal conclusion, and is permissible only in cases where indebtedness is pleaded *as a fact*, without showing how it arose. Boone, Code Pleading, §§ 63, 67. As to all of the material allegations of the complaint in this case, the defendant says he neither denies or admits them. In other words, he does not controvert them. And, not being controverted, the statute declares, in unmistakable language, that they *shall be taken as true*. The facts alleged being true, it follows that the plaintiff was entitled to judgment for want of an answer, unless the allegation in the so called answer, 'that more than six years has elapsed since the cause of said action on said judgment referred to in plaintiff's complaint accrued,' is new matter constituting a defense to the action. *Port v. Parfit*, 4 Wash. 369 (30 Pac. Rep. 328); *King v. Ilwaco, etc., Nav. Co.*, 1 Wash. 127 (23 Pac. Rep. 924)."

See also, *Columbia Nat. Bank v. Western Iron & Steel Co.*, 14 Wash. 162, 44 Pac. 145.

The reason of this rule applies with equal force to appellant's denial of the respondent's compliance with the terms of the contract, after admitting the execution of the unconditional written acceptance of the plant, which was an admission that the contract was complied with. This prevents appellant from putting in issue the performance of the contract by a mere denial that it has been performed. After such an admission of the execution of the written acceptance, he must plead some fact to avoid its legal effect, before it can be said he has tendered an issue thereon. We think no issue was tendered by these denials.

It is next contended in behalf of appellant that the affirmative facts pleaded in the answer are sufficient as a defense and counterclaim. It will be noticed, by the allegations of the complaint and admissions of the answer, that the parties have in express terms provided by their original written contract for the manner and time of making the test of the plant, for the express purpose of determining once for all, the question of whether or not the plant will "*produce the guaranteed results*"; that upon the completion of the ten-day test the plant shall then be accepted or rejected by appellant; if rejected, respondent is to be notified and the plant removed, and if accepted such acceptance "*shall be in full discharge of all agreements hereinbefore contained.*" In compliance with these terms, the plant was tested and thereupon accepted by respondent in the unequivocal words of this written acceptance. These being admitted facts, what is there in the affirmative allegations of this answer to avoid this formal acceptance of the plant having the effect of foreclosing all the rights claimed under such allegations?

It is alleged that the acceptance was signed under a mistake of fact in that appellant supposed that the plant would maintain the temperature and be of the capacity warranted and that he signed the acceptance in reliance upon the warranty. These allegations of the appellant can avail it nothing if, as a matter of fact, the contract and acceptance by their very terms preclude him from raising any such question. It is further alleged, and these seem to be the principal facts relied upon:

"That at the time the said plaintiff completed the construction of said refrigerating and ice-making plant which was in the month of January, 1906, the said plant would maintain the temperatures named and this defendant supposed that the temperatures would be maintained by said plant during the summer months and supposed that the said plant was of the capacity of twenty tons daily and shortly before April 11th, 1906, defendant discovered that said plant was not coming up to the warranty of plaintiff."

Thus is presented the question of whether or not after acceptance of the plant appellant can avail itself of its alleged discovery of the failure of the plant to maintain the stipulated temperature, and its want of capacity, in view of the express provisions of the contract, the test made in compliance therewith, and the acceptance thereafter. Counsel argue that these allegations of the answer show a latent defect, and one which could not be discovered until the warm weather came, and that it was only then it could be fully determined that the guaranteed temperature and capacity of the plant could be at all times maintained. The trouble with this argument is that, as one of the parties to the contract, respondent expressly agreed that the guaranteed results to be accomplished by the plant should be determined by the ten-day test, at the conclusion of which the plant was to be accepted or rejected, and if then accepted the same should be in full discharge of all agreements contained in the contract. It is not alleged that there was any fraud in the making of the test, nor in procuring of the signing of the release, nor any objections on the part of the appellant as to the test being made at the time it was made.

It seems to us the principle involved, and upon which the case of *Green v. Ballard*, 51 Wash. 149, 98 Pac. 95, was decided, is decisive of this question. In that case the city had contracted for the sinking of wells to produce a certain quantity of water daily, for a certain period, and upon a test to be made long before the expiration of the period, showing the capacity, the wells were to be accepted and paid for. After the completion and test, showing the agreed capacity, and before the expiration of the period, the wells failed in capacity, and this being urged as a defense to the contractor's suit for his agreed compensation, this court commented thereon, on page 154, as follows:

"We agree with counsel that the city contracted for the supply agreed upon for the period of fourteen months, and also that the proof fails to show that such supply was in fact furnished for that period. This would preclude a recovery

on the part of the respondent, unless the contract itself provides how the capacity of the well shall be ascertained, and such capacity was ascertained in the manner thus provided. . . . .

"This provision shows clearly that the capacity of the well for the entire period covered by the contract was to be ascertained by test, and that the contractor was to be paid in full for his work long before the expiration of the fourteen months. In other words, it was agreed between the parties that the capacity of the well for all the purposes of the contract should be ascertained by test as soon as the respondent was successful in obtaining a supply of water equal to 1,500,000 gallons per day of 24 hours, and that he should be entitled to the balance due under the contract at that time. We are aware that under this construction of the contract the appellant took chances on the supply holding out for the full period of 14 months, but in our opinion no other construction will give full effect to all the provisions of the contract, which are somewhat conflicting. It follows from what we have said that the test made by the appellant established the capacity of the well within the meaning of the contract, and that test entitled the respondent to the full compensation provided for in the contract."

This is in keeping with the holdings generally to the effect that when the parties have by the terms of their contract agreed that the guaranteed quality or capacity of the thing to be furnished shall be determined in a certain manner, and it is so determined, such determination becomes final. Whether the fact that the guarantee has been fulfilled is, by the terms of the contract, to be determined by test and acceptance based thereon, by silence after an agreed time for inspection, or by any other lawful method, the principle involved is the same. *Staver v. Rogers*, 3 Wash. 603, 28 Pac. 906; *Wasatch Orchard Co. v. Morgan Canning Co.*, 32 Utah 229, 89 Pac. 1009, 12 L. R. A. (N. S.) 540; *Pratt & Co. v. Langston Mercantile Co.*, 111 Mo. App. 96, 85 S. W. 134; *Columbia Rolling Mill Co. v. Beckett Foundry & Mach. Co.*, 55 N. J. L. 391, 26 Atl. 888; *Rowell v. Oleson*, 32 Minn. 288, 20 N. W. 227; *King v. Towsley*, 64 Iowa 75, 19 N. W. 859. We

think the answer fails to show facts constituting either a defense or counterclaim.

It is contended that the motion for judgment on the pleadings was an improper method of testing appellant's answer. This practice has heretofore been sanctioned by this court. *Port v. Parfit*, 4 Wash. 369, 30 Pac. 328; *Bethel v. Robinson*, 4 Wash. 446, 30 Pac. 734; *Lake v. Steinbach*, 5 Wash. 659, 32 Pac. 767; *Hanna v. Savage*, 7 Wash. 414, 35 Pac. 127, 36 Pac. 269; *Columbia Nat. Bank v. Western Iron & Steel Co.*, 14 Wash. 162, 44 Pac. 145; *Morris v. Healy Lumber Co.*, 33 Wash. 451, 74 Pac. 662; *Hubenthal v. Spokane & Inland R. Co.*, 43 Wash. 677, 86 Pac. 955. In the case last cited, at page 684, the court said:

"The first question discussed by the appellants is one of practice. It is claimed that the proper way to test the sufficiency of a pleading is by demurrer and not by motion for judgment on the pleadings. As an abstract proposition this is true. The practice of objecting to the introduction of testimony, or moving for judgment on the pleadings, because of some formal defect in the pleadings which may be cured by amendments is not to be commended. But where the motion for judgment goes to the substance of the action or defense and not to the mere form of allegation, there is no reason why the practice should not receive the sanction of the courts. If there is no cause of action or no defense, and no defect curable by amendment, the time of the court should not be taken up in hearing testimony that can avail nothing."

We think enough has been said in our discussion of the admissions and affirmative allegations of this answer to show that the motion for judgment upon the pleadings went to the very substance of appellant's defense and counterclaim. The answer does not appear upon its face to be susceptible of amendment so far as the defense and counterclaim therein attempted to be set up are concerned. We have seen that such defense and counterclaim would be unavailing to appellant, no matter how well it might be pleaded as to form. Neither does it appear by the record that appellant asked or desired to amend.

We conclude that the judgment of the learned trial court should be affirmed. It is so ordered.

RUDKIN, C. J., MOUNT, DUNBAR, and CROW, JJ., concur.

[No. 8222. Department One. November 15, 1909.]

THE CITY OF SEATTLE, *Respondent*, v. A. Z. ERICKSON, *Appellant*.[1]

ADULTERATION—FOOD—POSSESSION OF WATERED MILK—EVIDENCE—SUFFICIENCY. The evidence is sufficient to warrant the jury in finding that milk, taken from defendant's delivery wagon, was intended for human food, where his driver testified that he had completed his delivery, that the sample was taken from a can of sour milk which he was taking home and he had no milk in any other can, but the city inspector testified that he examined five or six cans out of 35 or 40 on the wagon and found milk in all of them, and there was other testimony that the milk taken was not sour.

SAME—WATERED MILK—EVIDENCE—SUFFICIENCY. The jury is warranted in finding that milk was watered, where two chemists who analyzed a sample found it below normal in its percentage of butter fats, and solids, one testifying that the milk was watered and the other that it was only skimmed.

CRIMINAL LAW—TRIAL—ARGUMENT—LIMITING TIME. It is not an abuse of discretion to limit the argument to fifteen minutes in a simple prosecution for the violation of a city ordinance prohibiting the possession of watered milk with intent to sell the same for human food (CHADWICK, J., dissenting).

Appeal from a judgment of the superior court for King county, Gay, J., entered May 1, 1909, upon a trial and conviction of the violation of a city ordinance, after a trial before a jury. Affirmed.

John E. Humphries and *George B. Cole*, for appellant.

Ellis DeBruler, for respondent.

RUDKIN, C. J.—The appellant was convicted of the crime of having in his possession, custody and control, with intent

[1]Reported in 104 Pac. 1128.

to sell for human food, milk to which water had been added, contrary to an ordinance of the city of Seattle. From the judgment of conviction, this appeal is prosecuted, and two errors are assigned as grounds for reversal.

First, insufficiency of the evidence to justify the verdict and judgment; and second, error in law in limiting counsel for appellant to fifteen minutes in their argument to the jury. It is conceded that the appellant is engaged in the business of selling and delivering milk for human food in the city of Seattle, and that on the date alleged in the complaint two samples were taken from a can of milk in the possession of one of his drivers. There were but two controverted questions of fact at the trial. First, was the milk in the can from which the samples were taken intended for sale for human food; and second, was the milk watered. The testimony on these issues was very brief. The driver testified that he had completed his morning delivery at the time the samples were taken; that the samples were taken from a can of sour milk which he was taking home from a restaurant; that this was the only can in his wagon containing milk at the time, and that the milk was not intended for sale. The city inspector who took the samples testified, on the other hand, that the driver had thirty or forty cans in his wagon; that he examined five or six of these, each of which contained milk, and other testimony on the part of the city showed that the milk was not sour. In view of this testimony, the business in which the appellant was engaged, the conduct of the driver at the time the samples were taken, and all the surrounding circumstances, we think the jury were warranted in saying that the milk was intended for sale for human food.

The appellant and his employees testified that no water was added to the milk while in their possession, so that the question of whether the milk was watered depended upon the testimony of the two chemists who analyzed the samples above referred to, the one for the appellant, the other for the respondent. These two witnesses differed in their conclusions

only. Each found substantially the same percentage of butter fat and other solids in the milk, and each testified that the milk was considerably below normal in respect to these solids. The witness for the respondent testified that the milk was watered, while the witness for the appellant testified that it was only skimmed. A bare statement of this testimony shows that the question at issue was for the jury.

We think, also, that a mere statement of the issues and testimony shows that the court did not abuse its discretion in limiting the time for argument before the jury. A person accused of crime has a constitutional right to be heard by counsel, and of this right the court may not deprive him, but at the same time the power of the court to regulate the exercise of the right by reasonable rules and regulations is no longer questioned. "In the absence of statutory provisions prescribing the practice, it rests in the sound discretion of the court to put a proper limit to the time to be consumed by counsel in argument, a discretion with which an appellate court will not interfere unless the time was made so short as to be manifestly prejudicial to the rights of the party complaining. 2 Ency. Plead. & Prac., p. 701. The rule is thus stated in *People v. Kelly*, 94 N. Y. 526:

"The time which counsel are to occupy in presenting a case to the consideration of a jury necessarily must be, to a great extent, a matter in the discretion of the court. Were it otherwise an unlimited period might be taken without any advantage to the client, and causing great delay in the proceedings of the court and an injury to the administration of justice. The time to be used for such a purpose must, therefore, be a matter to be regulated by the presiding judge upon the trial, the same as any other proceeding during the progress of the case. It is to be presumed that the court will properly guard and protect the rights of parties so that justice can be administered to all, and the judge is certainly a competent and the proper person to determine as to the time which would be required for a proper discussion and presentation of the case upon trial. Hence it follows that a court has a right to exercise a discretion in this respect, and

unless such discretion is abused it is not the subject of review in a higher tribunal."

In *State v. Page*, 21 Mo. 257, 64 Am. Dec. 229, after tracing the practice of limiting the time for argument in judicial proceedings back to ancient Greece and Rome, the court said: "We conclude, therefore, that a quarter of an hour allowed to a modern orator in a petty case of cutting down timber on the school lands cannot be considered as an inhibition to be heard in defense of his client." Within these rules, we do not think that any abuse of discretion has been manifested here. Counsel for appellant cite *State v. Mayo*, 42 Wash. 540, 85 Pac. 251, in support of the claim that there was an abuse of discretion on the part of the court below, but in the *Mayo* case the accused was on trial for his life, the trial was long and tedious and the testimony voluminous. Such a case forms no criterion for a simple case like this. There is no error in the record, and the judgment is affirmed.

FULLERTON, GOSE, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting)—The evidence in this case is abundant to sustain the verdict, but I cannot agree with that part of the opinion of the court holding that fifteen minutes was sufficient time for argument to the jury.

[No. 7938. Department Two. November 16, 1909.]

Archie Benner, *Respondent*, v. Wallace Lumber & Manufacturing Company, *Appellant*.[1]

Master and Servant—Negligence of Master—Defective Appliance—Guards—Factory Act. A master is not relieved from the duty of properly safeguarding saws and so "maintaining" them, as required by the factory act, by the fact that various servants, from time to time, removed the safeguards supplied, to suit their own convenience, where the injured servant did not do so, and was ordered to work upon an unguarded saw.

Same—Assumption of Risks. Assumption of risks is not a defense to an action for personal injuries sustained by reason of the master's failure to guard a saw as required by the factory act.

Master and Servant — Appliances — Guarding Machinery—Factory Act—Prima Facie Case—Instructions—Harmless Error. In an action for personal injuries sustained by a knot-sawyer while at work upon an unguarded saw, it is not prejudicial error to refuse to give defendant's requested instruction that the posted certificate of inspection of the labor commissioner was *prima facie* evidence of compliance with the factory act requiring the guarding of saws (made so by statute), where there was much evidence that the saw in question was not guarded and the defendant had introduced evidence, including that of the inspector himself, to show that it was properly guarded; the *prima facie* case thereby becoming immaterial.

Appeal from a judgment of the superior court for Snohomish county, Neterer, J., entered June 29, 1908, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a shingle mill. Affirmed.

Roberts & Hulbert, for appellant.

Lyter & Folsom and *S. G. Murray*, for respondent.

Crow, J.—This action was originally commenced by Archie Benner, an infant, by Mary Benner, his guardian *ad litem*, against the Wallace Lumber & Manufacturing Company, a corporation, to recover damages for personal in-

[1]Reported in 105 Pac. 145.

juries sustained. Prior to the trial the plaintiff attained his majority, and now prosecutes the action. From a judgment in his favor the defendant has appealed.

The appellant owns and operates a shingle mill in Snohomish county, in which the respondent, a young man about twenty years of age, was employed as a shingle packer. The mill was equipped with three knot saws, and occasionally the appellant directed the respondent to operate one of them. He had worked on the saw at different times, to the total amount of seventeen and one-half days. The saw was adjusted on an arbor immediately in front of, and about eighteen inches from, the sawyer. Slightly above the saw was a shelf or table, on which were the shingles which were to be trimmed by the sawyer. The edge of the table, when properly constructed, so extended over the saw as to leave only a small portion thereof exposed, thus serving as a safeguard for the protection of the sawyer. Immediately in front of the sawyer, and slightly below the level of the table, was a sliding carriage upon which he placed the shingles he intended to trim. He then pushed the carriage under the table, carrying the shingles against the saw and trimming them. The sawyer was compelled to reach over the table for the shingles, and in doing so passed his hand above the level of the saw.

On the morning of the accident, appellant's foreman directed him to operate the knot saw. About three o'clock in the afternoon, as respondent withdrew his hand after reaching over the table for shingles, it in some manner came in contact with the saw, and was severely injured. In his complaint and on the trial, he contended that the appellant was guilty of negligence in failing properly to safeguard the saw, and that he was injured by reason thereof.

The first, and as we regard it, the controlling contention made by the appellant, is that the trial court erred in denying its motion for a directed verdict. It contends that the saw had been properly guarded, but that the guard had been

removed and replaced from time to time by appellant's employees, certain other knot sawyers, for their own convenience in performing their work. There was evidence tending to show that, when the saw was first installed and the table was first constructed, some years prior to the accident, the edge of the table had been sufficiently extended to constitute a practical safeguard. It was further shown that, from time to time, the knot sawyers would chop out or saw off the edge of the table, leaving greater portions of the saw exposed; that other knot sawyers, before commencing work, would nail on a band or cleat to again extend it and more securely guard the saw, and that the various sawyers, from time to time, made these changes according to their own ideas.

Appellant therefore contends that, when it, as the master, had properly constructed the table to serve as a guard, it had discharged its full duty, and that if the sawyers thereafter removed, changed, or added to the guard, the appellant was not guilty of negligence in failing to install or maintain the same. This contention cannot be sustained. Whenever a master employs a servant, or changes the character of his work, it is the master's duty, at the inception of and during such employment, to furnish the servant a reasonably safe place in which to work, and to also comply with the requirements of the factory act in properly safeguarding saws and other dangerous machinery, where guards are practical. Whether an employee has wilfully changed, removed, or destroyed a proper safeguard, provided by the master, might become a material issue if such servant, being injured, should attempt to recover damages. But no such issue is now before us. There is ample evidence in the record to show that, when the appellant directed the respondent to commence work on the saw, it was not then properly guarded, a fact the master should have known, and that by reason of the absence of a proper guard, the respondent was injured. A reckless or negligent servant might wilfully remove a proper guard that had been provided by the master. An-

other servant more cautious and conservative might himself voluntarily perform the duty of the master by restoring the guard before commencing his work. The respondent did neither. He was under no obligation to provide or change the guard. He commenced work upon the saw in obedience to the order of the master, and the only question to be determined is whether it could be, and was then, guarded as required by the factory act. As above stated, the appellant introduced considerable evidence to show that it was the custom of knot sawyers to repeatedly change, remove, or add to the guard, to suit their own convenience, and in substance contended that, when it had once properly safeguarded the saw, it had discharged its duty, and that the custom of the employees constituted a sufficient excuse to relieve it of any charge of negligence resulting from its subsequent failure to restore the guard. The statute not only requires that guards be provided, but also that they be *maintained* in use. Laws 1907, p. 448, ch. 205, § 1.

The appellant cites *Johnston v. Northern Lumber Co.*, 42 Wash. 230, 84 Pac. 627, and *Daffron v. Majestic Laundry Co.*, 41 Wash. 65, 82 Pac. 1089, and contends, on the authority of those cases, that it is relieved from liability for negligence by reason of the fact that it had properly safeguarded the saw. There is a marked difference between the facts of the case at bar and those of the cases cited. In the *Johnston* case the guard had not been changed or removed. It had been in use for a number of years. It had not only been properly installed, but had been also maintained. The servant had been working at the machine with the same guard during all of that time. The contention there made was that some guard other than the one actually used should have been adopted. In the *Daffron* case it appeared that a proper guard had been provided. Here the fact seems to be that no practical or proper guard whatever was provided for the knot saw, at the particular time the respondent went to work, or during the time he continued at work. If the appellant

could excuse its neglect by relying upon the action of the knot sawyers in changing or removing the guards, such a defense would be equivalent to withdrawing from the jury the vital issue whether the saw was properly guarded when used by the respondent, and substituting in lieu thereof an immaterial inquiry into the custom of knot sawyers who had preceded respondent in operating the saw. The statute does not contemplate or permit any such defense or excuse. There was abundant evidence to sustain the jury in finding that a practical guard could be provided, that it was not provided at the time the respondent commenced work, and that as a result thereof he was injured. The motion for a directed verdict was properly denied.

The trial court instructed the jury on the defense of assumption of risk pleaded by the appellant. After the jury had retired, the respondent promptly interposed an exception to the giving of this instruction. Thereupon the jury were recalled, and the trial judge withdrew the defense from their consideration as not being an issue in the case. The appellant has assigned error upon the withdrawal of the instruction. The controlling issue of fact in this case was whether the knot saw could be and was guarded. The only ground of negligence alleged was appellant's failure to guard. If appellant had guarded there could be no recovery. If the saw could not be guarded, appellant was in no event negligent. Assumption of risk was not an issue in the case. If appellant had failed to provide proper guards when practicable, the defense could not be interposed. *Hall v. West & Slade Mill Co.*, 39 Wash. 447, 81 Pac. 915.

The mill had been inspected by the deputy labor commissioner, who issued a certificate which the appellant posted in compliance with the requirements of the statute. The certificate was admitted in evidence, and the deputy who made the inspection appeared as a witness for appellant and testified as to what he considered necessary to constitute a proper safeguard, and stated the condition in which he found the

mill. The appellant in writing requested, with others, the following instructions No. 19:

"You are instructed that under the law of this state that if the operator of a mill has his mill inspected by the labor commissioner or one of his deputies and receives a certificate of inspection and posts the same in his mill, that this certificate is *prima facie* evidence that the factory act has been complied with and that the machinery and appliances have been constructed and maintained in a reasonably safe condition. In other words, the law requires the operator of a mill to have his mill inspected by the state labor commissioner of this state and whenever this is done and a certificate is issued to the owner of a mill and the certificates are posted in the mill the presumption is that the mill operator has complied with the law with reference to the guards and other matters and that the mill is in a proper condition and that the operator has furnished and maintained reasonable and proper safeguards; so, if you should find in this case that the defendant company had its mill inspected by the state labor commissioner or his deputy and that the commissioner had issued a certificate of inspection, copies of which certificates were posted in the mill, then I instruct you that this was *prima facie* evidence of the defendants having complied with the factory act. It is *prima facie* evidence that the knot-saws in question in this case were reasonably and properly guarded, and I further instruct you that if the defendant in this case had complied with the factory act in regard to the furnishing of reasonable safeguards then I instruct you that the plaintiff cannot recover and your verdict must be for the defendant; you are instructed also that even if the defendant failed to comply with the factory act in furnishing a reasonable and proper safeguard, yet if the plaintiff himself was guilty of negligence he cannot recover and your verdict must be for the defendant."

This instruction was not given, nor did the trial judge give any other instruction relating to the inspection by the deputy, and the posting of his certificate. Appellant has assigned error upon the refusal of the instruction requested. In the order denying the motion for new trial, the trial judge said:

"The defendant in support of its motion for a new trial urges two reasons: . . . 2nd. That the court refused

to give the defendant's requested instruction No. 19. The instruction as requested should not have been given; it was not error to refuse it. Was it error not to give an instruction covering the certificate of inspection? If the court's attention has been actually called to the fact, or if the exception to the instruction as given had been actually taken at the time, the court perhaps would have recalled the jury so as to preclude all possibility of error; the question now is, was prejudicial error committed? The deputy labor commissioner was present in court and testified fully as to the facts upon which his conclusion was based in issuing this certificate of inspection. The reason for the rule to make the certificate *prima facie* evidence was overcome by his testimony in court. The certificate could not be stronger than the testimony upon which it was based; and this was before the jury, and must be weighed as other evidence. If the testimony was absent, and the certificate was present, a different condition would exist. The certificate would not be admissible in evidence, unless made so by the legislature, because the examination was *ex parte*, and the defendant would be deprived of the facts before the jury upon which the certificate is based. The instructions given preclude all possibility of error. The burden in the case at no time shifted; it at all times remained with the plaintiff. It was incumbent upon the plaintiff to show by a fair preponderance of the evidence that the machinery was not guarded, and that it could be guarded, and all the facts being before the jury, and the court having instructed the jury, as in this case, it is inconceivable how error could be predicated upon the record as it stands in this case, conceding that the requested instruction was proper. The motion for a new trial is denied, and exception noted."

Some question arises in our minds as to whether the appellant is in a position to predicate error upon any of the instructions given or refused. The record shows that no exceptions were taken by it until after the jury had returned its verdict; that by stipulation the parties agreed that its exceptions might be taken at any time prior to the hearing of the motion for a new trial, and that written exceptions were subsequently made by the appellant. In view of the fact that the respondent has raised no question as to the sufficiency of these exceptions, and that in any event we find

no prejudicial error in giving or refusing instructions, we will, without deciding, assume for the purposes of this case that the appellant's exceptions were, under the circumstances, sufficient.

On the record before us, we are constrained to hold that no prejudicial error was committed by the trial judge in failing to give the requested instruction upon the effect of the certificate as evidence. If no evidence other than the certificate had been introduced to show the safeguarding of the saw or to dispute the same, it would upon proper request have been the duty of the trial judge to instruct the jury that such certificate was *prima facie* evidence of compliance on the part of appellant with the requirements of the factory act. During the trial much evidence was introduced by the respondent to show that as a matter of fact the saw was not properly safeguarded, while the appellant introduced evidence not only of other witnesses but also of the inspector himself to show that it was safeguarded. This being true, no issue as to the existence of a *prima facie* case was before the jury for its consideration. Although it would have been proper for the trial judge to give an instruction upon this subject, we fail to see how his omission to do so constituted prejudicial error or could have affected the verdict, in the light of the issues framed by the pleadings and the evidence introduced at the trial. The issuance and posting of the certificate was not disputed, and it is not at all improbable that the jury would give more consideration to the potency of the certificate as evidence of a performance of statutory duty by the appellant than if they had been told that it constituted *prima facie* evidence only.

Other exceptions have been taken to instructions given and refused. We have carefully examined the instructions given by the trial judge, and find that they fully, clearly and correctly state all questions of law applicable to the issues in this case which, under the pleadings and evidence, were proper for the consideration of the jury. The evidence is abun-

dantly sufficient to show that the knot saw could have been, but was not, safeguarded, that for the want of any guard the respondent was injured, and that he was not guilty of contributory negligence.

The judgment is affirmed.

RUDKIN, C. J., MOUNT, PARKER, and DUNBAR, JJ., concur.

[No. 8213. Department One. November 16, 1909.]

JOHN VAN DYKE, *Respondent*, v. SEATTLE ELECTRIC COMPANY, *Appellant*.[1]

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,700, for personal injuries sustained by a passenger in a collision of street cars, approved by the trial judge, will not be disturbed as excessive, where testimony of equal credibility is conflicting as to whether there was any injury at all, two disinterested physicians testifying to injury to the spine from shock which would likely be permanent, and for which the verdict was hardly compensatory, and two physicians, appointed by the court, testifying that the plaintiff had no serious trouble of any kind.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 31, 1908, upon a verdict of a jury rendered in favor of the plaintiff, for personal injuries sustained by a passenger in a collision of of street cars. Affirmed.

James B. Howe and *H. S. Elliott*, for appellant.

Martin J. Lund, for respondent.

FULLERTON, J.—The appellant owns and operates a street railway in the city of Seattle. The respondent, while a passenger on one of its cars, was injured, and brought this action to recover therefor. In the court below the jury returned a verdict in his favor for $3,700. The trial judge who heard the evidence refused to disturb the verdict, and

[1]Reported in 105 Pac. 137.

judgment was entered in favor of the respondent for the sum named. The railway company appeals from the judgment, and assigns as error that the judgment is excessive.

The respondent was injured by a collision between the car upon which he was riding and another car of the appellant company. He testified, that the shock of the collision threw him forward from his seat to the floor; that in his fall he struck the corner of the seat in front of him, causing a slight abrasion of the skin at the point of contact, but otherwise there was no objective evidence of his injury; that after the collision, he took a car and rode to the place where the car passed nearest his home, and walked the remainder of the way without assistance, a distance of four blocks; that during the night he was taken with severe pains in his side and back, preventing him from sleeping for the remainder of the night; that in the morning he went down to the heart of the city for the purpose of consulting the railway company's physician, again walking the distance from his home to the car line on the way down, and from the car line to his home on his return, without assistance or the aid of crutches; that after he reached home from his visit to the doctor, he was obliged to take to his bed, from which he did not rise until some three weeks thereafter, all the time suffering with severe pains in his side and back; that when he left his bed he was unable to walk without assistance or the use of crutches; and that this was his condition at the time of the trial. The respondent's family physician, and two other physicians called into consultation, testified that the respondent was suffering from an injury to his spine which could be caused, and probably was caused, by shock he received at the time of the accident; further testifying that such injuries were difficult to treat satisfactorily, and were usually more or less permanent.

On the other hand, the appellant offered testimony tending to show that the defendant was shamming in a measure; that his injuries were neither permanent nor consequential;

there being no serious functional trouble of any character. The company's physician testified that his condition at no time departed from normal, and two physicians appointed by the court who examined him just before the trial testified that he had no serious trouble of any kind, and nothing that would be permanent or lasting.

The foregoing, while but a brief outline of the evidence, tends to show how hopelessly conflicting the evidence is, and how utterly impossible it is to reconcile the several statements of the witnesses on any common ground. If the respondent's evidence is true, he was severely injured, and the verdict, instead of being excessive, is hardly compensatory. On the other hand, if appellant's version of his injury be correct, the verdict is grossly excessive, as the amount of the recovery should be but little more than nominal. Which of these conflicting versions is the correct one, this court cannot discern from this record. The witnesses appear to be of equal repute, of equal intelligence, and, outside of the parties in interest, of equal disinterestedness. In such a case the advantage is all with the trier of fact who has the privilege of seeing the witnesses. He can observe their demeanor while on the stand, their manner of testifying, their frankness or lack of frankness—in fact, the many things that tend to discover truth that is hidden in the printed pages of the record. This advantage, it need not be added, was in this instance, with the jury and trial judge, and since they have found with the respondent we feel that we have no warrant to disturb their finding.

The judgment must be affirmed, and it is so ordered.

RUDKIN, C. J., CHADWICK, MORRIS, and GOSE, JJ., concur.

[No. 8166. Department One. November 16, 1909.]

COATS SHINGLE COMPANY *et al.*, *Respondents*, v. THE CITY OF HOQUIAM *et al.*, *Appellants*.[1]

MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS — ACTION TO ENJOIN—COMPLAINT—DEFINITENESS. In an action by owners of property abutting on a street, to enjoin an assessment thereof for street improvements, attacking the proceedings as a whole and not any particular lien on specific property, the allegation as to plaintiff's property need only be sufficiently definite to show their interest, and it is not error to refuse to require the complaint to set out a specific description.

SAME—COMPLAINT—SUFFICIENCY—OPPORTUNITY TO BE HEARD. A complaint to enjoin an assessment for a street improvement in a city of the second class states a cause of action where it is alleged that the city is proceeding to make the assessment without giving the plaintiff property owners notice or opportunity for a hearing upon the equalization of the assessments, as required by Laws 1907, p. 623, § 40, and that the city has included large sums not a part of the cost of the improvement and not properly chargeable to the property benefited, without an opportunity to be heard.

Appeal from a judgment of the superior court for Chehalis county, Irwin, J., entered March 8, 1909, in favor of the plaintiff, upon overruling a demurrer to the complaint, in an action to enjoin an assessment for a street improvement. Affirmed.

Sidney Moor Heath and *James P. H. Callahan*, for appellants.

C. W. Hodgdon and *Morgan & Brewer*, for respondents.

FULLERTON, J.—The respondents brought this action against the city of Hoquiam to enjoin the collection of an assessment for a street improvement attempted to be imposed upon their property by that city. They stated their cause of action as follows:

"Come now the plaintiffs above named and for cause of action against the defendants, allege:

"(1) That the Coats Shingle Company is a corporation,

[1]Reported in 105 Pac. 141.

duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business in the city of Hoquiam, Chehalis county, Washington, and that it has paid its annual license fee due to the state of Washington, for the year ending June 30th, 1909; and that the Polson Shingle Company is a corporation, duly organized and existing under and by virtue of the laws of the state of Washington, having its principal place of business at Hoquiam, in said county and state, and that it has paid its annual license fee due to the state of Washington, for the year ending June 30th, 1909.

"(2) That the city of Hoquiam is, and at all times herein mentioned was, a municipal corporation of the state of Washington, to wit: a city of the second class duly organized and existing under and by virtue of the laws of said state, and said J. A. Fairburn, treasurer, is and at all times herein mentioned was the duly elected, qualified and acting treasurer of said city of Hoquiam.

"(3) That on or about the 9th day of June, 1908, the city council passed and adopted a resolution providing for the improvement of Ontario street in the city of Hoquiam to deep water from a point opposite and between blocks sixty (60) and sixty-one (61) in Ontario Addition to the city of Hoquiam, which resolution was duly published in the official paper of said city, to wit: the Weekly Grays Harbor Washingtonian.

"(4) That subsequent thereto and on or about the 22d day of September, 1908, an ordinance was passed by the city council, further providing for the improvement of said street between the points specified, and the same was on or about the 23d day of September, 1908, approved by the mayor of said city, and said ordinance has not been and was not published in the city official paper and no publication thereof was made as required by law.

"(5) That notwithstanding said ordinance was never published the city council of the city of Hoquiam called for bids for doing said work and said notice was not published in the official paper of the city of Hoquiam, and was not published at all as required by law.

"(6) That bids were received by said city council and bids for doing said work was the sum of four and 6½ 100 dollars ($4.06½) per lineal foot and there was included in said bid and made a part thereof, the sum of one hundred

dollars ($100), which sum the said city council required and demanded of the contractors that they should include in their bid over and above the cost of the work and which said city council required should be given to and delivered to said city of Hoquiam from the first warrant that was thereafter to be delivered to the contractors for the doing of said work so that the amount bid and for which the work was offered to be done was the sum of one hundred dollars ($100) more than the actual amount to be received and retained by the contractors.

"(7) That said city council passed an order and motion awarding to the Grays Harbor Construction Company the contract for doing said work above referred to and the contract was entered into between the said city and said Grays Harbor Construction Company for the doing of said work, and said company constructed the work and improvement on said Ontario street.

"(8) That, thereafter, and on or about the 14th day of September, 1908, a purported assessment roll was delivered to the city clerk of the city of Hoquiam, and, thereupon, notice of the meeting of the city council as a board of equalization regarding said purported assessment roll was directed to be given, but said notice of the meeting of the city council as a board of equalization was not published in the city official paper and was not published at all as required by law; but notwithstanding that said notice was not published as required by the ordinances of the city of Hoquiam, and as required by law, said city council met but did not equalize said purported assessment roll and the same never has been equalized, and these plaintiffs had no knowledge or notice of any meeting or attempted meeting of said council as a board of equalization, or at all.

"(9) That these plaintiffs are the owners of the land adjacent and abutting said "Ontario street;" that notwithstanding the fact that no ordinance was ever published for the doing of said work or notice published of the meeting of the board of equalization and notwithstanding the fact that no equalization was ever had or notice published calling for bids, said city council caused a purported assessment roll to be made and delivered to the city treasurer of the city of Hoquiam, to wit: J. A. Fairburn, defendant above named, and said J. A. Fairburn, attempted to give notice and sent notices to these plaintiffs that an assessment had been made

upon the property owned by them for the improvement of said Ontario street in the sum of twenty-three hundred seven and 10-100 dollars ($2,307.10) each, and said city treasurer notified said plaintiffs that unless the same was paid within thirty (30) days the same would become delinquent, and further informed plaintiffs that unless paid the same would be certified to the treasurer of Chehalis county and filed with said treasurer as provided by statute of the state of Washington in regard to delinquent assessments, and notified these plaintiffs that there would be added thereto a penalty of eight (8) per cent and interest at the rate of eight (8) per cent per annum.

"(10) That there was included in said purported assessment alleged to have been made upon said land, and which these plaintiffs were notified and required to pay, the sum of one hundred dollars ($100) over and above and more than the cost of doing said work by said Grays Harbor Construction Company, and the plaintiffs are informed and believe and therefore allege the fact to be that warrants for said sum of one hundred dollars ($100) were issued to the said Grays Harbor Construction Company, and by them immediately returned to and delivered to the city of Hoquiam and there was also included in said purported assessment roll the sum of about six hundred dollars ($600) over and above and more than the amount of the bid of said Grays Harbor Construction Company and said amount was placed upon said purported assessment roll as a charge and assessment against these plaintiffs and their property.

"(11) That a part of the improvement of said Ontario street consisted of a dock and wharf upon the lands of the state of Washington adjoining and adjacent to deep water of Grays Harbor and the Chehalis river, which dock and wharf was located entirely upon the harbor area on the water front, which harbor area is owned exclusively by the state of Washington and these plaintiffs have not a lease thereof from the state of Washington and have not a contract of purchase of the same, and said lands cannot be sold by the state of Washington, but is held and under the laws of the state of Washington must be held by said state and not sold; that the value of said wharf and dock so located upon said lands as aforesaid, and the cost thereof to construct was about the sum of thirteen hundred dollars ($1,300) and notwithstanding the location of said wharf and dock as

aforesaid, said city council attempted to assess and included in said purported assessment roll as an assessment against the property of these plaintiffs about the sum of thirteen hundred dollars ($1,300) or more, and said amounts aforesaid so assessed against the property of these plaintiffs was wilfully and fraudulently done and done for the purpose of compelling these plaintiffs to pay more than in equity they should pay.

"(12) That said purported assessment roll above referred to is now in the hands of the treasurer of said city and he threatens to and will unless restrained and enjoined, by this honorable court, certify said roll as delinquent to the county treasurer of Chehalis county to be spread upon the records of said treasurer's office and the same will become an apparent lien and charge upon the property of these plaintiffs to their irreparable injury and damage.

"(13) That the plaintiffs have no plain, speedy or adequate remedy at law and if said assessment roll be certified to the said treasurer of the county of Chehalis, the same will be by him entered upon his records and the said treasurer will issue to any person applying therefor, certificates of delinquency, which said certificates will constitute an apparent cloud and lien upon the property of these plaintiffs.

"(14) That all of the acts and attempted acts of said city council and the officers of said city were done and performed without any jurisdiction and these plaintiffs had no notice or knowledge of said acts until after the same had been done and after they had been notified by said city treasurer that an assessment had been levied and made upon the property owned by them."

The appellant, appearing by its counsel, moved the court to require the respondents to make their complaint more definite and certain by setting out a specific description of their real property affected by the assessment. This motion the court overruled, whereupon the city demurred on the ground that the complaint failed to state facts sufficient to constitute a cause of action. The demurrer was likewise overruled, and the city refusing to plead further, judgment was entered against it. From that judgment, this appeal is prosecuted.

The appellant first urges that the court erred in overrul-

ing its motion to require the respondents to make their complaint more definite and certain. But no error was committed in this respect. The respondents were attacking the assessment proceedings as a whole, not as a lien upon a specific tract of property. The allegation as to the property affected needed to be only sufficiently definite to show the respondents' interest, and this was shown by the allegations to the effect that they owned property abutting upon the improved street and that the city had illegally sought to impose a lien thereon exceeding five thousand dollars.

The demurrer was also properly overruled. While the complaint is not as specific as it might have been made, it clearly appears therefrom that the city did not follow very closely the provisions of its charter. By § 38 of the statute providing for the government of cities of the second class (Laws 1907, p. 623.), the city of Hoquiam is empowered to improve its streets at the expense of the abutting property holders benefited by the improvement, and may declare its intention to improve any such street either by resolution or ordinance. Section 40 provides the manner in which the assessment shall be made, prescribing that it shall be done by ordinance, which ordinance shall designate the officer or officers whose duty it shall be to prepare an assessment roll. This section also requires that the ordinance shall prescribe the mode for equalizing the assessment roll, empowering the city council to act as a board of equalization. Section 58 provides that, before any ordinance shall take effect, it shall be published in the official newspaper of the city. It is these provisions of the charter that seem to have been violated. It appears from the complaint that the initiatory steps towards making the improvement were taken both by resolution and ordinance, the resolution only being published for the prescribed time and in the prescribed manner; that the required notice of the time and place fixed for equalizing the assessment roll was not given, thus denying to those interested therein and affected thereby any opportunity to be heard concerning the

inequalities of the roll. In fact, it is alleged that no equalization of the roll was had. Moreover it is alleged that large sums were included in the assessment roll not a part of the cost of the improvement, and not properly chargeable to the property holders benefited by the improvement, against the insertion of which the property holders whose property was attempted to be assessed were given no opportunity to protest or object.

These irregularities were sufficient to avoid the assessment, and since the city confesses to their truth by electing to stand upon its demurrer, the judgment entered by the trial judge must be affirmed. It is so ordered.

RUDKIN, C. J., CHADWICK, GOSE, and MORRIS, JJ., concur.

[No. 8242. Department Two. November 16, 1909.]

GEORGE WALTER AIKEN *et al.*, *Respondents*, v. WILLIAM F. BOYD, *Appellant*.[1]

BOUNDARIES — SURVEY — CORRECTIONS — EVIDENCE — SUFFICIENCY. Findings that a disputed boundary line was correctly established by a certain survey are sustained, when supported by the weight of the testimony showing that it coincided with two other surveys, and it appears that the survey was made at the instance of appellant, who conveyed other portions of his land with reference to the line as established thereby; and it is immaterial that the respondent acquired a quit claim of the disputed strip from a third person.

Appeal from a judgment of the superior court for King county, Morris, J., entered February 26, 1909, upon findings in favor of the plaintiffs, in an action to restrain a trespass, after a trial on the merits before the court without a jury. Affirmed.

John B. Van Dyke and *T. F. Bevington*, for appellant.

Peters & Powell, for respondents.

[1]Reported in 104 Pac. 1101.

RUDKIN, C. J.—On the 21st day of September, 1901, the defendant, William F. Boyd, and Sarah Boyd, his then wife, conveyed to the plaintiff George Walter Aiken and one Alice M. Aiken the following described tract of land, in King county:

"Beginning at the southeast corner of the southwest quarter of the northeast quarter of section 15, township 24 north of range 3 east of the W. M. thence 139 feet north; thence 946.32 feet west; thence 9 feet south; then west in a straight line to the meander line on the shores of Puget Sound; thence southeasterly along said meander line to a point due west of place of beginning; thence east to place of beginning, containing 5 acres, more or less."

Before the commencement of this action, Alice M. Aiken conveyed her undivided one-half interest in the property to the plaintiff George Walter Aiken. On two different occasions, the plaintiffs attempted to construct a fence along what they deemed the northerly boundary of the tract thus conveyed, but in each instance the fence was torn down and destroyed by the defendant, and this action was instituted to restrain further interference on his part. The plaintiffs had judgment below, and the defendant appeals.

A reference to the description will show that the east and west center line of section fifteen forms the southerly boundary of the tract, and, if that line is established, the location of the northerly line is a mere matter of measurement. The record shows that a number of different surveys have been made for the purpose of establishing the east and west center line of this section, such as the survey made by the city of Seattle, the White survey, the Gardner survey, and the Anderson survey. According to the city survey, the White survey, and the Gardner survey, the fence constructed by the respondents was on the northerly line of their land, while according to the Anderson survey the northerly line of the land is 18.11 feet south of the proposed fence at the east end of the tract, and 39.38 feet south at the west end. In other words, the Anderson survey fixed the east and west center line

of the section 18.11 feet south of the other surveys at the initial point mentioned in the description, and 39.38 feet south at the southwest corner of the tract. Under this state of facts, the appellant contends, first, that the Anderson survey is the correct one; and second, that the conveyance was made with reference to the Anderson survey, and that that survey, right or wrong, must control. The court below found against the appellant on both of these contentions, and its findings are amply sustained by the testimony.

It seems to us that the overwhelming weight of the testimony shows that the Gardner survey, according to which the fence was being constructed, is the correct one, and that the tract was not conveyed with reference to any particular survey or boundary. Indeed, the testimony tends to show that both the White and Gardner surveys were made at the instance of the appellant for the express purpose of locating the boundary, and that he sold portions of his land on the north with reference to those surveys, thus selling land which he did not own if the Anderson survey is to be adopted. The fact that the appellant undertook to sell land that he did not own does not concern the respondents, but it tends to show the understanding of the parties. Complaint is made because the respondents acquired a quitclaim deed from the property owner to the south for a strip of land lying between the Gardner survey and a certain street shown by the Anderson survey, but that question does not concern the appellant. The testimony clearly shows that the respondents purchased the identical lands they are now claiming, and that the acts of the appellant are without warrant or authority in law.

The judgment is therefore affirmed.

MOUNT, PARKER, CROW, and DUNBAR, JJ., concur.

[No. 7853. Department One. October 6, 1909.]

CHARLES ELREY *et al.*, *Appellants*, v. HARLAN P. CHRISTIE *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for Franklin county, Zent, J., entered September 15, 1908. Reversed.

A. C. Routhe and *A. A. Hinman*, for appellants.

Horrigan, O'Brien & Coad, for respondents.

PER CURIAM.—This case depends upon the same record and is controlled by the case of *Timmerman v. McCullagh*, *ante* p. 204, 104 Pac. 212. For the reasons given in that case the judgment is reversed, and the cause remanded with instructions to enter a judgment for the appellants quieting the title to the property described in their complaint.

[No. 7657. *En Banc*. November 4, 1909.]

J. B. CORDINER, *Appellant*, v. MILLARD R. MCMAHAN *et al.*, *Respondents*.[2]

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered July 14, 1908. Affirmed.

Cordiner & Cordiner and *J. C. Kleber*, for appellant.

Reeves & Reeves, for respondents.

PER CURIAM.—This action involves the question determined in the case of *Cordiner v. Dear*, *ante* p. 479, 104 Pac. 780, and is affirmed on the grounds stated in the opinion in that case.

[No. 7658. *En Banc*. November 4, 1909.]

J. B. CORDINER, *Appellant*, v. MINNIE L. KIRKENDALL *et al.*, *Respondents*.[3]

Appeal from a judgment of the superior court for Chelan county, Steiner, J., entered July 14, 1908. Affirmed.

Cordiner & Cordiner and *J. C. Kleber*, for appellant.

Reeves & Reeves, for respondents.

PER CURIAM.—This action involves the question determined in the case of *Cordiner v. Dear*, *ante* p. 479, 104 Pac. 780, and is affirmed on the grounds stated in the opinion in that case.

[1]Reported in 104 Pac. 214.

[2]Reported in 104 Pac. 783.

[No. 7708. Department Two. November 15, 1909.]

OLYMPIA LIGHT & POWER COMPANY, *Respondent*, v. TUMWATER POWER & WATER COMPANY, *Appellant*, LEOPOLD F. SCHMIDT *et al.*, *Defendants*.[1]

Appeal from a judgment of the superior court for Thurston county, Linn, J., entered May 4, 1908. Dismissed.

G. C. Israel, *Martin L. Pipes*, *George H. Funk*, and *Frank C. Owings*, for appellant.

T. N. Allen and *Troy & Falknor*, for respondent.

PER CURIAM.—By virtue of a stipulation of the parties on file herein, to the effect that this cause shall abide the disposal of cause No. 7707, in which an opinion was filed herein on the 28th day of October, 1909, *Olympia Light & Power Co. v. Tumwater Power & Water Co.*, *ante* p. 392, 104 Pac. 778, it is hereby ordered that the appeal herein be dismissed.

[No. 8177. Department One. November 16, 1909.]

FRANK N. McCANDLESS, *Appellant*, v. FRED T. PETERSON *et al.*, *Respondents*.[1]

Appeal from a judgment of the superior court for King county, Morris, J., entered February 20, 1909, upon findings in favor of the defendants, after a trial before the court without a jury. Reversed.

Blattner & Heasty and *L. B. da Ponte*, for appellant.

Larrabee & Wright, for respondent Peterson.

Fred L. Rice and *Cross & Rice*, for respondents Fraser *et al.*

PER CURIAM.—This action was brought to recover certain property sold on tax foreclosure sale. The facts bring it within the recent cases of *Gould v. Knox*, 53 Wash. 248, 101 Pac. 886; *Gould v. White*, 54 Wash. 394, 103 Pac. 460; *Gould v. Stanton*, 54 Wash. 363, 103 Pac. 459.

The case is therefore reversed, with instructions to the lower court to ascertain the value of the permanent improvements put upon the property by the respondents, and also all amounts paid out in taxes, special taxes, and local assessments, under the provisions of chapter 137, Laws 1903, and to enter judgment accordingly.

[1]Reported in 104 Pac. 1135.

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28. APPEAL—REVIEW—VERDICTS. The verdict of a jury upon conflicting evidence is conclusive on appeal. *McKenzie v. North Coast Colliery Co.* 495

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As defeating right to default, see JUDGMENT, 4.
As estoppel to object to hearing of motion, see TRIAL, 1.

APPLIANCES:

Liability of employer for defects, see MASTER AND SERVANT, 2-7.

APPORTIONMENT:

Of expenses or benefits of public improvements, see MUNICIPAL CORPORATIONS, 7-9.

APPROPRIATION:

Of water rights in public lands, see WATERS AND WATER COURSES, 4, 5.

APPROVAL:

Of contract as requisite to performance, see CONTRACTS, 6.

APPURTENANCES:

Passing by lease, see LANDLORD AND TENANT, 9.

ARCHITECTS:

Approval or certificate of architect, arbitrators, or others of performance of contract, see CONTRACTS, 6.
Dismissal of suit for failure to secure certificate, see DISMISSAL AND NONSUIT, 2.

ARGUMENT OF COUNSEL:

In criminal prosecutions, see CRIMINAL LAW, 5.

ASSENT:

Necessity for to constitute contract, see CONTRACTS, 2.

ASSESSMENT:

Reviewing local assessments, see APPEAL AND ERROR, 30.
For public improvements, see MUNICIPAL CORPORATIONS, 5-17.
Of tax, see TAXATION, 1-6.

ASSESSMENT WORK:

see MINES AND MINERALS, 4.

ASSIGNMENT:

Fraud as to creditors, see FRAUDULENT CONVEYANCES.
Mortgage as equitable assignment by vendee in possession, see MORTGAGES.
Right of assignee of option to purchase land, see VENDOR AND PURCHASER, 4, 5.

ASSIGNMENT OF ERRORS:

See APPEAL AND ERROR, 17.

ASSOCIATIONS:

Reports of credit association as libelous, see LIBEL AND SLANDER, 3-5.

ASSUMPSIT, ACTION OF:

See WORK AND LABOR.

ASSUMPTION:

Of risk by employee, see MASTER AND SERVANT, 16-23.

ATTENDANCE:

Of pupils at school, see SCHOOLS AND SCHOOL DISTRICTS.

ATTORNEY AND CLIENT:

Liability for contempt of court in advising course resulting in contempt by client, see CONTEMPT, 4.
Argument and conduct of counsel at trial in criminal prosecution, see CRIMINAL LAW, 5.
Liability for attorneys fees in divorce, see DIVORCE, 3, 4.
Allowance of attorneys fees to administrator, see EXECUTOR AND ADMINISTRATORS, 3, 4.
Fraud of attorney as ground for setting aside judgment, see JUDGMENT, 8.

1. ATTORNEY AND CLIENT—COMPENSATION—EVIDENCE OF EMPLOYMENT—SUFFICIENCY. Findings to the effect that an attorney was em-

ATTORNEY AND CLIENT—CONTINUED.

ployed by a corporation, or at least that the corporation ratified the employment, are sustained where it appears that the officers had conversations with the attorney about the suits, in which it was interested, directed action to be taken therein, and upon request paid part of the attorney's bill. *McKay v. Atkinson & Co.* 591

AUTHORITY:

Of broker, see BROKERS.
Of agent, see PRINCIPAL AND AGENT.

AUTOMOBILES:

Opinion evidence as to competency of driver, see EVIDENCE, 6.
Negligence in driving, see MUNICIPAL CORPORATIONS, 32-34.
Injuries from fright of horses, see NEGLIGENCE, 2, 3.
Collision with street car, see STREET RAILROADS, 5.

BAR:

Of action by former adjudication, see JUDGMENT, 9-12.

BETTERMENTS:

Recovery in ejectment, see EJECTMENT.

BILLS AND NOTES:

1. BILLS AND NOTES—BONA FIDE PURCHASER—HOLDER IN DUE COURSE—NEGLIGENCE. One who purchases a note for value before maturity without notice of any defect, is a holder in due course, within Laws 1899, p. 350, §§ 52, 56, and his rights cannot be defeated without proof of actual notice of defects or bad faith, even if he omitted precautions or was negligent. *Gray v. Boyle* 578

2. BILLS AND NOTES—BONA FIDE PURCHASER—LEGALITY OF CONSIDERATION—VIOLATION OF STATUTE—EFFECT. Laws 1905, p. 373, prohibiting insurance rebates does not invalidate a note given for the premiums in violation of the statute, as against a holder of the note in due course; since it is not the policy of the law to render negotiable paper void in the hands of innocent holders where the statute has not so expressly declared. *Gray v. Boyle*..... 578

3. BILLS AND NOTES—CONSIDERATION—VALIDITY—FORBEARANCE. A note given by a son to cover a shortage of his deceased father, an officer in a bank, is not shown to be given for an unlawful consideration by the fact that it was desired to keep the defalcation quiet, where the bank forbore to make claim against the decedent's estate, since such forbearance constitutes a good consideration. *Galena National Bank v. Ripley*..... 615

BONA FIDE PURCHASER:

Of bill or promissory note, see BILLS AND NOTES, 1.
Of lands, see VENDOR AND PURCHASER, 3-5.

BONDS:

See INDEMNITY.
Contractor's bond, failure to require, see MUNICIPAL CORPORATIONS, 18, 19.
Municipal bonds, see MUNICIPAL CORPORATIONS, 36-38.
Sureties on bonds, see PRINCIPAL AND SURETY.

BOUNDARIES:

1. BOUNDARIES — SURVEY — CORRECTIONS — EVIDENCE — SUFFICIENCY. Findings that a disputed boundary line was correctly established by a certain survey are sustained, when supported by the weight of the testimony showing that it coincided with two other surveys, and it appears that the survey was made at the instance of appellant, who conveyed other portions of his land with reference to the line as established thereby; and it is immaterial that the respondent acquired a quitclaim of the disputed strip from a third person. *Aiken v. Boyd* 696

BREACH:

Of contract, see CONTRACTS.
Of contract of sale, see SALES, 1-3.

BRIEFS:

Assignment of errors in, see APPEAL AND ERROR, 17.

BROKERS:

Oral contract for commissions as moral obligation, see CONTRACTS, 1.

1. BROKERS—COMMISSIONS—AGREEMENT TO PAY—EVIDENCE—SUFFICIENCY. The verdict of a jury, for $1,000 for an agreed broker's commission, on the sale of a gas plant, should be set aside for want of any substantial evidence to justify it, where, in answer to special interrogatories, the jury found that the plaintiff represented that he had, and that he did have, an unexpired option to control the majority of the stock of the gas company, in consideration of which the defendant promised to pay the commission, and plaintiff testified that he could not swear that he had an option and was merely confident that there was an option, from statements made by his partner, and the other evidence conclusively showed that he never had any option. *Burrows v. Seymour*..... 318

2. BROKERS — COMMISSIONS — EVIDENCE — SUFFICIENCY. Defendants cannot escape liability for commissions for securing a loan, upon the plea that their signed application was merely tentative and to determine whether a loan could be made, where a contract for the commissions was signed, the broker procured a party ready and willing to make the loan on the terms proposed in the application, and the conditions insisted upon as to the title were covered by the application. *Philips & Co. v. Langlow*..... 385

BROKERS—CONTINUED.

3. SAME—DEFENSES—ACTING AS AGENT FOR BOTH PARTIES. A broker may act as agent of both parties, and is entitled to commissions agreed to be paid by one party, with knowledge that he was agent for the other party. *Philips & Co. v. Langlow*..... 385

4. BROKERS—CONTRACT OF AGENT—RECOVERY OF DEPOSIT—PARTIES LIABLE. Where lots were sold by one of the defendants to G. and resold by G. to the plaintiff, the fact that G.'s agent in effecting the resale was also a selling agent for the first defendant and officed with the other defendant, would not render the defendants liable for the return of plaintiff's earnest money on G.'s failure to consummate the resale to plaintiff; plaintiff's only remedy being against G. and his agent. *Jones v. Jones*..... 531

BUILDING CONTRACTS:

See CONTRACTS, 6.

Failure to secure architect's certificate, see DISMISSAL AND NONSUIT, 2.

BURDEN OF PROOF:

Waiver of compensation of executor, see EXECUTORS AND ADMINISTRATORS, 1.

Of payment, see INDEMNITY, 2.

BURGLARY:

Venue, where property is removed to another county, see CRIMINAL LAW, 4.

CANCELLATION OF INSTRUMENTS:

Cancellation of release, see RELEASE.

CARRIERS:

Excessive damages, see DAMAGES, 9, 14.

1. CARRIERS—OF LIVE STOCK—CONVERSION—BREACH OF CONTRACT—EVIDENCE—SUFFICIENCY. A carrier, removing from a car horses that had been burned and were suffering intensely, for the purpose of treatment and as an act of humanity, is not guilty of a conversion, although the removal was objected to by the shipper and there was conflict in the evidence as to whether they could have stood the balance of the trip. *Spokane Grain Co. v. Great Northern Express Co.*..... 545

2. CARRIERS—OF LIVE STOCK—CONVERSION—BREACH OF CONTRACT—VARIANCE. A verdict for plaintiff, in an action for conversion of horses, taken by defendant, a carrier, from the car during transportation, for the purpose of treatment for burns caused by a fire in the car, cannot be sustained on the theory of breach of the contract of carriage and negligence of the defendant in setting the fire,

CARRIERS—CONTINUED.

where the complaint was based solely upon the ground of conversion, the jury were instructed that it was immaterial whether the fire was negligently set by the plaintiff or defendant, and the evidence of negligence was admitted only upon the defendants' counterclaim for charges in treating and caring for the horses. *Spokane Grain Co. v. Great Northern Express Co.* 545

CAVEAT EMPTOR:

See SALES, 3.

CERTIFICATE:

Of architects, of performance of contract, see CONTRACTS, 6.
Of delinquency issued to person paying taxes, see TAXATION, 7-9.

CERTIORARI:

Review of condemnation proceedings, see EMINENT DOMAIN, 15, 16.

CHANGE OF VENUE:

Of civil actions, see VENUE.

CHARGE:

To jury in civil actions, see TRIAL, 5-15.

CHARTER:

Restrictions on municipal grant of franchise, see STREET RAILROADS, 1.

CITIES:

See MUNICIPAL CORPORATIONS.

CITIZENS:

Equal protection of laws, see CONSTITUTIONAL LAW.

CIVIL:

Action, nature, grounds and incidents, see ACTION.
Contempt, see CONTEMPT.
Rights, constitutional guaranty of civil rights, see CONSTITUTIONAL LAW, 3.

CLAIMS:

Mining claims, see MINES AND MINERALS.

CLASS LEGISLATION:

See CONSTITUTIONAL LAW.

COLLATERAL ATTACK:

Upon incorporation, see CORPORATIONS, 1.
On judgment, see JUDGMENT, 4-7, 9.

COLOR OF TITLE:

Necessity to sustain adverse possession, see ADVERSE POSSESSION.

COMMISSIONER OF PUBLIC LANDS:

Power to lease mineral lands, discretion, see PUBLIC LANDS.

COMMISSIONS:

Of broker, see BROKERS.
Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2.

COMMON CARRIERS:

See CARRIERS.

COMMUNITY PROPERTY:

In general, see HUSBAND AND WIFE.

COMPENSATION:

Of attorney, see ATTORNEY AND CLIENT.
Of broker, see BROKERS.
Of corporate officer or agent, see CORPORATIONS, 2-4.
Of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 1, 2.
Of tenant for improvements, see LANDLORD AND TENANT, 3-8.
Of receiver, see RECEIVERS.

COMPULSORY ATTENDANCE:

See SCHOOLS AND SCHOOL DISTRICTS.

COMPROMISE AND SETTLEMENT:

Relinquishment of right or claim by release thereof, see RELEASE.

CONCLUSION:

Of witness, see EVIDENCE, 5, 6.

CONDEMNATION:

Taking property for public use, see EMINENT DOMAIN.

CONDITIONAL SALES:

As waiver of maritime lien, see MARITIME LIENS, 1, 2.

CONDITIONS:

Precedent to actions, see APPEAL AND ERROR, 39.
Precedent to action on building contract, architects certificate, see CONTRACTS, 6.
Dismissal for failure of conditions precedent, see DISMISSAL AND NONSUIT, 2.
Payment of suit money, before action to set aside divorce, see DIVORCE, 2.
Precedent to condemnation proceedings, see EMINENT DOMAIN, 4, 5.
Precedent to action to annul tax judgment, see TAXATION, 19, 21.

CONSIDERATION:

Of bill of exchange or promissory note, see BILLS AND NOTES, 2, 3.
Of contract in general, see CONTRACTS, 1.
Of fraudulent conveyance, see FRAUDULENT CONVEYANCES.
Of release, see RELEASE.

CONSTITUTIONAL LAW:

Due process, sale of estate of absentees, see ABSENTEES, 3.
Effect of repeal of criminal statutes on offenses committed prior thereto, see CRIMINAL LAW, 2, 3.
Condemnation of property, see EMINENT DOMAIN.
Loan of credit, see MUNICIPAL CORPORATIONS, 38.
Limitation on power of municipality to incur indebtedness, see MUNICIPAL CORPORATIONS, 32.
Retrospective construction and operation of statutes, see STATUTES, 9.
Subjects and titles of statutes, see STATUTES, 1-4.
Obligation of contract, see TAXATION, 8.

1. CONSTITUTIONAL LAW—RIGHT TO ENGAGE IN OCCUPATIONS—HEALTH REGULATIONS—MUNICIPAL CORPORATIONS. Ordinances of a city of the first class creating a crematory department for the collection and disposition of refuse and garbage, and making it unlawful for any person other than authorized employees of the department to engage in hauling in the city any such refuse, except manure, are not unconstitutional as preventing one formerly in that business from engaging in a lawful occupation. *Smith v. Spokane* 219

2. CONSTITUTIONAL LAW—POLICE POWER—HEALTH REGULATIONS—MUNICIPAL CORPORATIONS. Ordinances conferring the exclusive right to collect garbage and refuse upon a city department are within the police power in that they tend directly to promote the public health. *Smith v. Spokane* 219

3. CONSTITUTIONAL LAW—PRIVILEGES OF CITIZENS—PEDDLERS—DISCRIMINATION BETWEEN CLASSES. Laws 1909, p. 736, requiring a county license from peddlers, except peddlers of agricultural and farm products, and books, periodicals and newspapers, does not arbitrarily discriminate between persons in substantially the same situation, but the classification is reasonable and germane to the object and purpose of the legislation and therefore constitutional. *McKnight v. Hodge* 289

4. SAME—DISCRIMINATION BETWEEN LOCALITIES—DELEGATION OF POWER. Laws 1909, p. 736, requiring a county license from all peddlers except in cities and towns when their licensing is regulated by such cities or towns, in not an unconstitutional discrimination between classes, since the legislature may delegate, as a revenue measure, the power on the subject to cities and towns, and it is not necessary that the police power be exercised by uniform regulations throughout the state. *McKnight v. Hodge* 289

CONSTITUTIONAL LAW—CONTINUED.

5. SAME—DISCRIMINATION BETWEEN CLASSES. Laws 1909, p. 736, requiring a license fee of $100 from peddlers on foot, $150 and $250 from peddlers with one and two horses, and $300 from peddlers with other conveyances, is not unconstitutional as exacting unequal fees, as the classification is a proper basis for measuring the license fee. *McKnight v. Hodge* 289

CONTEMPT:

Orders reviewable, see APPEAL AND ERROR, 1, 2.

1. CONTEMPTS—VIOLATION OF JUDGMENT—CIVIL REMEDIES—DAMAGES FOR LOSS. Under Bal. Code, § 5807, providing that in contempt proceedings the court may give judgment to indemnify an aggrieved party, in addition to the punishment imposed, the court should award damages in a proceeding for contempt for the violation of a judgment. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co.* 1

2. SAME—APPEAL—SUPERSEDEAS. A party is guilty of a technical contempt in violating a judgment pending an appeal which was either abandoned or dismissed for want of jurisdiction, and is liable to the aggrieved party to the extent of the loss sustained, notwithstanding the appeal was prosecuted in good faith under an order and bond superseding the judgment pending the appeal. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co.* 1

3. CONTEMPT—CIVIL OR CRIMINAL—INDEMNITY. Where contempt in the violation of a court order is not wilful or defiant, but an exercise of a supposed right, done in good faith by advice of counsel, the party will not be punished as for a direct or criminal contempt, but as for a civil contempt, and he may, pursuant to statute, be required to indemnify the other party. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co.* 1

4. CONTEMPT—CIVIL CONTEMPT—AGAINST WHOM AWARDED—ATTORNEY FOR PARTY. The power to award indemnity for a civil contempt resting entirely upon statute, Bal. Code, § 5807, authorizing the court to give judgment that the party aggrieved recover of the defendant a sum sufficient to indemnify him, does not authorize a judgment against the attorney for a defendant corporation who was a stockholder and advised the act which resulted in a contempt by the corporation and its officers, where the attorney acted in good faith. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co.* 1

5. SAME—CIVIL AND CRIMINAL CONTEMPT. A civil judgment for contempt for violating an order of the court may be granted, although no criminal contempt was committed. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co.* 1

CONTRACTS:

See BILLS AND NOTES.
Compensation of broker, see BROKERS.
Breach of contract to carry live stock, see CARRIERS.
Liberty to contract as personal right, see CONSTITUTIONAL LAW, 3.
Liquidated damages or penalties, see DAMAGES, 1.
Measure of damages for breach, see DAMAGES, 2.
Breach after partial performance, see ELECTION OF REMEDIES.
Agreements within statute of frauds, see FRAUDS, STATUTE OF.
Of indemnity, see INDEMNITY.
Of insurance in general, see INSURANCE.
Cutting and hauling logs, see LOGS AND LOGGING.
Of loan, see MONEY LENT.
Of cities in general, see MUNICIPAL CORPORATIONS, 4.
Power to delegate authority, see MUNICIPAL CORPORATIONS, 5.
Liabilities incurred under agent's contracts, see PRINCIPAL AND AGENT.
Of suretyship, see PRINCIPAL AND SURETY.
Release of rights, see RELEASE.
Sales of personalty, see SALES.
Impairing obligation of, see TAXATION, 8.
Sale of land, see VENDOR AND PURCHASER.
Implied obligations to pay for services rendered, see WORK AND LABOR.

1. CONTRACTS—CONSIDERATION—MORAL OBLIGATION—FRAUDS, STATUTE OF. An oral contract with a broker to pay commissions on the sale of real estate, void under the statute of frauds, raises a moral obligation which is sufficient consideration to support a subsequent written agreement to pay the same, after the rendition of the services. *Muir v. Kane* 131

2. CONTRACTS—ACCEPTANCE—CONDITIONAL—CONSTRUCTION BY PARTIES. The parties are shown to have construed a contract as unconditionally accepted, by acting upon it, where it appears from letters that defendant offered to assume payment of a contract for printing a catalogue, "on condition that there will be no additional charges beyond the original contract price of $800," which was accepted by the plaintiff with the understanding that it was "to have the $800 as originally agreed, and no changes to be made in your copy except at your expense," that plaintiff stated it thought none would be necessary, but if any were made plaintiff would "expect $1.25 per hour for composition"; and where the defendant thereupon informed the plaintiff to go ahead with the work and furnish proofs, which was done. *General Lithographing & Printing Co. v. Washington Rubber Co.* 461

3. CONTRACTS—CONSTRUCTION—"PROFITS"—DEPRECIATION OF PLANT. Where the owner of all of the stock of a coal mining corporation sold one-half thereof under an agreement reciting that the profits

CONTRACTS—CONTINUED.

to be divided did not include the profits in the business of the mining company made prior to April 1st, 1906, by "profits" the parties understood and meant that which would remain after deducting the cost of operation from the income of the mine, and no deduction for depreciation in the plant or machinery was contemplated. *Boothe v. Summit Coal Mining Co.* 167

4. CONTRACTS—CONSTRUCTION—GUARANTY. Where originally plaintiff had a contract with M. company to print a catalogue, which was to be an advertising medium for that company, and also for the defendant company, and after delay, the defendant offered to "assume payment" of the contract price on delivery of the catalogue, which offer was accepted, the same amounts to more than a mere guarantee, but is an independent contract for the printing, where defendant's interest directly appears. *General Lithographing & Printing Co. v. Washington Rubber Co.* 461

5. CONTRACTS—PERFORMANCE—EVIDENCE—SUFFICIENCY. In an action to recover one thousand dollars due upon the performance of a contract to furnish certain amusement attractions for one month, a verdict for $525 is supported by the evidence, where it appears that plaintiff performed the contract in so far as not excused or prevented from performing by the defendant. *Meador v. Northwestern Gas. & Elec. Co.* 47

6. CONTRACTS — ACTIONS — CONDITIONS PRECEDENT — ARCHITECT'S CERTIFICATE—IMPEACHMENT FOR FRAUD. The stipulation in a building contract that the certificate of the architect as to the amount due shall be deemed conclusive may be impeached for fraud when an excessive amount is allowed without the exercise of the architect's judgment. *Ilse v. Aetna Indemnity Co.* 487

CONVERSION:

Of live stock shipped, see CARRIERS.
Of corporate funds by officer, see CORPORATIONS, 4.

CONVEYANCES:

In fraud of creditors, see FRAUDULENT CONVEYANCES.
Of ward's property by guardian, see GUARDIAN AND WARD.
In trust, see TRUSTS.

CORPORATIONS:

Notice to officer or agent of insurance company as notice to company, see INSURANCE, 5.
Capacity to sue, waiver of objection, see MECHANICS' LIENS, 3.
Municipalities, see MUNICIPAL CORPORATIONS.

1. CORPORATIONS—EXISTENCE—DE FACTO CORPORATIONS—COLLATERAL ATTACK. The failure to execute articles in triplicate and keep one copy in the office of the corporation, does not affect the *de facto*

CORPORATIONS—CONTINUED.

existence of a corporation otherwise duly incorporated, and followed by user; and in such case the incorporation cannot be collaterally attacked in a civil action between the corporation and third persons. *Kwapil v. Bell Tower Co.* 583

2. CORPORATIONS—OFFICERS—SALARY—INCREASE BY OWN VOTE AND SUBSERVIENT TRUSTEES. An increase in the salary of an officer of a corporation who was a trustee and owned half of the stock, through his own vote and the votes of trustees subservient to him, is fraudulent and illegal; and this, regardless of the value of the services, where it was improperly made in violation of an agreement with the owner of the other half of the stock. *Boothe v. Summit Coal Mining Co.* 167

3. CORPORATIONS—RECEIVERS—SOLVENCY—DEADLOCK AND DIFFERENCES. A temporary receiver should be appointed for a corporation, though solvent and prosperous, where two persons at bitter enmity with one another, each held one-half of the stock, and through a deadlock and inability to elect officers, one of them, as a hold-over trustee, with two subservient dummies, seized complete control of the corporation, excluded his rival from all participation in the business, refused him an inspection of the books, and illegally increased his own salary, and it appears that a new board cannot be elected, and there is no prospect of adjusting the differences; and the receivership will be made permanent in case the differences cannot be adjusted within a time limited. *Boothe v. Summit Coal Mining Co.* 167

4. CORPORATIONS — OFFICERS — ACTIONS AGAINST — EVIDENCE — SUFFICIENCY. The evidence is sufficient to show that an officer of a corporation had overdrawn his account, where there was a dispute as to the amount of his salary, but he had kept the books, and entered the salary as claimed by the corporation, had admitted to others that such sum was correct, and that he had overdrawn his account, and the books showed that he had taken more than the salary entered. *Kwapil v. Bell Tower Co.* 583

COSTS:

Jurisdiction to charge against property, see RECEIVERS.

CO-TENANCY:

See TENANCY IN COMMON.

COUNCIL:

See MUNICIPAL CORPORATIONS, 1-3.

COUNTIES:

Legislative validation of franchise in county road, see FRANCHISES. Franchise, curative act, construction, see STATUTES, 9.

COURTS:

Power of supreme court to compel certification of statement of facts, see APPEAL AND ERROR, 15.
Power to award damages for civil contempt, see CONTEMPT.
Condemnation proceedings, see EMINENT DOMAIN.
Conclusiveness of judgments, see JUDGMENT, 9-12.
Mandamus as remedy to compel assumption of jurisdiction where remedy by appeal exists, see MANDAMUS.
Power to control vacation of streets, see MUNICIPAL CORPORATIONS, 27.
Power to control franchise ordinances, see MUNICIPAL CORPORATIONS, 30.
Power to bring in new parties, see PARTIES.
Province of court and jury, see TRIAL, 3-5.

1. COURTS—APPELLATE COURTS—JUDICIAL NOTICE. An appellate court cannot take judicial notice of what the trial court cannot judicially notice. *Pacific Iron & Steel Works v. Goerig* 149

2. COURTS—REVIEW OF ITS OWN DECISIONS—DIFFERENT JUDGES. A decision by the trial judge upon deciding the case is not affected by the fact that another judge had ruled differently in deciding a demurrer in the case. *Philips & Co. v. Langlow* 385

3. COURTS — MOTIONS — JURISDICTION — JUDGMENT — VACATION — RES JUDICATA. Under Bal. Code, §4766, giving an attorney authority to bind his client by agreement, and Id., § 4668, authorizing a superior judge of one county to hold a session of the court at the request of the judge of another county, at the seat of judicial business, and Laws 1901, p. 76, § 2, authorizing any judge who has heard a motion or case in any county outside his district to decide or determine the same in any county in the state, the parties to an action in D. county may stipulate that a motion to vacate the judgment may be heard at the county seat of S. county, before the superior judge of W. county, and upon entry of an order accordingly and transfer of the papers, such trial judge has jurisdiction to hear and decide the motion, the parties having appeared by counsel and argued the same; and his order is *res judicata*. *Meisenheimer v. Meisenheimer* 32

COVENANTS:

In lease, see LANDLORD AND TENANT, 2, 4-8.

CREDIT ASSOCIATIONS:

Reports of as libelous, see LIBEL AND SLANDER, 3-5.

CREDITORS:

See FRAUDULENT CONVEYANCES.

CRIMINAL LAW:

See ADULTERATION; CONTEMPT; FALSE PRETENSES; PERJURY.

Practicing medicine without license, see PHYSICIANS AND SURGEONS, 1.

Violation of compulsory education act, see SCHOOLS AND SCHOOL DISTRICTS.

1. CRIMINAL LAW—DEFENSES—CRIMES UNDER VARIOUS ACTS. It is no defense to a prosecution for obtaining a donation of money by false pretenses, in violation of Bal. Code, § 7165, that the same act is punishable under the vagrancy act, *Id.*, § 6724. *State v. Swan*.. 97

2. CRIMINAL LAW—STATUTES—REPEAL—EFFECT ON PENDING PROSECUTION. The repeal of the act of 1890, § 8, relating to the practice of medicine without a license, by the act of 1909, p. 677, without any saving clause for the prosecution of offenses committed under the old law, bars pending prosecutions, and a conviction thereunder is error (reversed on rehearing). *State v. Hanover*..... 403

3. CRIMINAL LAW—STATUTES—REPEAL—EFFECT ON PENDING PROSECUTION. The saving clause in Laws 1901, Ex. Ses., p. 13, providing that no pending prosecution for any offense shall be affected by any repeal of a criminal or penal statute, unless the contrary intention is expressly declared in the repealing act, is constitutional; and a pending prosecution for practicing medicine without a license, is not affected by Laws 1909, p. 677, repealing former laws before trial and conviction of the accused. *State v. Hanover* 403

4. CRIMINAL LAW—VENUE—RIGHT TO TRIAL BY JURY OF VICINAGE. Bal. Code, § 6791, providing that when property taken by burglary, etc., in one county has been brought into another county, the jurisdiction is in either county, violates Const., art. 1, § 22, providing that the accused shall have the right to a trial by a jury of the county in which the offense is alleged to have been committed; and a demurrer should be sustained to an information for burglary committed in one county, filed in another county into which the property was alleged to have been taken. *State v. Carroll*..... 588

5. CRIMINAL LAW—TRIAL—ARGUMENT—LIMITING TIME. It is not an abuse of discretion to limit the argument to fifteen minutes in a simple prosecution for the violation of a city ordinance prohibiting the possession of watered milk with intent to sell the same for human food. *Seattle v. Erickson*..... 675

CROSSINGS:

Accidents at railroad crossings, see RAILROADS.

Accident at street railroad crossings, see STREET RAILROADS.

CUMULATIVE EVIDENCE:

As ground for new trial, see NEW TRIAL.

CURATIVE ACTS:

Retroactive operation, see STATUTES, 9.

DAMAGES:

Complaint for, sufficiency, see ACTION, 1.
For civil contempt, orders reviewable, see APPEAL AND ERROR, 1, 2.
Measure of, harmless error in instructions, see APPEAL AND ERROR, 35.
For breach of carrier's contract for transportation, see CARRIERS.
Award of, for civil contempt, see CONTEMPT.
In condemnation proceedings, see EMINENT DOMAIN, 7-11.
Opinion evidence as to damages, see EVIDENCE, 4.
When to be specially pleaded, see LIBEL AND SLANDER, 5.
Release of claim for damages, see RELEASE.

1. DAMAGES—CONTRACT—BREACH—"LIQUIDATED DAMAGES." A stipulation in a contract for the exchange of real estate to pay and forfeit the sum of $500 as liquidated and agreed damages for nonperformance of the contract by either party, is to be construed as liquidated damages and not as a penalty, since the damages suffered by a breach are uncertain, and the sum stipulated is not disproportionate to the probable damages, or unconscionable. *Madler v. Silverstone*.... 159

2. DAMAGES—BREACH OF CONTRACT—MEASURE. Upon a breach of a contract for a catalogue, upon which work had been done, by refusal to allow the same to be completed, the measure of damages was the reasonable value of the work done, the depreciation in the value of paper purchased for it, and the profit plaintiff would have made. *General Lithographing & Printing Co. v. Washington Rubber Co.* 461

3. DAMAGES—INJURIES FROM MALPRACTICE—MEASURE—INSTRUCTIONS. In an action for malpractice in negligently communicating a loathsome disease, an instruction on the measure of damages properly submits to the consideration of the jury the plaintiff's physical and mental pain, loss of time, humiliation and disgrace, and expense of effecting a cure, including physician's charges and medicines. *Helland v. Bridenstine* 470

4. DAMAGES—INJURY TO HORSE—MEASURE OF DAMAGES. The measure of damages for injury to a horse is the diminished market value after cure, and expense in reasonable attempts to effect a cure, with reasonable compensation for loss of use, provided the whole damages do not exceed the original value of the horse. *Wilson v. Seattle, Renton & Southern R. Co.* 656

5. DAMAGES—INJURIES—MALPRACTICE—EXCESSIVE VERDICT. A verdict for $4,000 for malpractice in negligently communicating a private disease by the use of infected instruments, is excessive, and should be reduced to $2,000, where the plaintiff was fully cured without per-

DAMAGES—CONTINUED.

manent disability, and her losses were less than $200, the balance being for pain and suffering, which must be limited to compensatory damages. *Helland v. Bridenstine* 470

6. DAMAGES—TO PERSONAL PROPERTY—EXCESSIVE VERDICT. A verdict for damages for injury to personal property is not excessive where there was no dispute as to the items, which were all within the measure of damages allowable. *Wilson v. Seattle, Renton & Southern R. Co.* 656

7. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $4,000 for injuries resulting in a fractured jaw, the loss of an ear, disfigurement, and impaired physical condition, is not excessive. *Well v. Moran Bros. Co.* 102

8. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries for $5,000 reduced by the trial court to $3,000, is not excessive, where plaintiff's nose was broken, his foot permanently injured, and he was incapacitated for twelve weeks, losing wages at $2.50 per day. *Juul v. Kitsap Transportation Co.* 156

9. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries for $3,708, reduced by the trial court to $3,008, is not excessive, where it appears that the plaintiff, a carpenter and joiner, twenty-eight years old, earning $3.50 a day, lost the entire little finger of his left hand, the middle finger above the knuckle joint, and the end of the index finger, leaving them very sensitive to the touch and cold and incapable of picking up material or tools. *Rood v. Seattle Elec. Co.* 217

10. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,500 for the loss of part of the great toe and a crippled condition of the foot causing a perceptible limp, is excessive and should be reduced to $2,500, where it appears that the plaintiff was 29 years of age, employed at $9 per week with a promise of an increase to $12 or $15, that she was in a hospital five weeks, gangrene required several operations, and she suffered considerably. *Nelson v. Bromley* 256

11. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for personal injuries for $6,375 is excessive, and should be reduced to $4,000 where it appears that the plaintiff, employed as an oiler, at $2.50 a day, 50 years of age, sustained an injury to the ankle, restricting its movement somewhat and causing pain, and requiring him to walk with a cane, that he was in the hospital two weeks and on crutches five months, and he was allowed to testify as to a much larger earning capacity in another employment in which he had not engaged for some time and did not expect to engage in. *Smith v. Hewitt-Lea Lumber Co.* 357

DAMAGES—CONTINUED.

12. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $5,000 for fractures of leg and arm held not excessive. *Hoseth v. Preston Mill Co.* 416

13. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $30,000 for injuries sustained by a coal miner twenty-four years of age, is excessive and should be reduced to $22,000, where it appears that both legs were paralyzed and he had lost control of his bowels and urinary organs, but that he was able to go about on crutches, and there was some hope for improvement, and the complaint limited his earning capacity to $150 per month. *McKenzie v. North Coast Colliery Co.* 495

14. DAMAGES—PERSONAL INJURY—EXCESSIVE VERDICT. A verdict for $3,000 for a broken ankle is not excessive, where it appears that the plaintiff was thirty-five years old, engaged in domestic service, that she lost several months' time, spent $320 for doctor's bills, part of the ankle bone was removed, and there was some evidence that the injury was permanent. *Keane v. Seattle* 622

15. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for $3,700, for personal injuries sustained by a passenger in a collision of street cars, approved by the trial judge, will not be disturbed as excessive, where testimony of equal credibility is conflicting as to whether there was any injury at all, two disinterested physicians testifying to injury to the spine from shock which would likely be permanent, and for which the verdict was hardly compensatory, and two physicians, appointed by the court, testifying that the plaintiff had no serious trouble of any kind. *Van Dyke v. Seattle Electric Co.* 687

DECEDENTS:

Estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

DECISION:

Former decisions as controlling, see JUDGMENT, 9.

DEEDS:

Between husband or wife, see HUSBAND AND WIFE, 1, 3.
Separate property of married woman, see HUSBAND AND WIFE, 3.
Tax deeds, see TAXATION, 16.
In trust, see TRUSTS, 4.

DEFAMATION:

See LIBEL AND SLANDER.

DEFAULT:

Judgment by, see JUDGMENT, 1-3.

DEFECT:

In title defeating contract of sale of land, see VENDOR AND PURCHASER, 1.

DELEGATION:

Of legislative powers, see CONSTITUTIONAL LAW, 1, 2, 4.

DELIVERY:

Of goods sold, see SALES, 1.

DEMURRER:

Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 31.

To pleading, see PLEADING, 2, 3.

DESCENT AND DISTRIBUTION:

See WILLS.

Sale of estate of absentees, see ABSENTEES.

1. DESCENT AND DISTRIBUTION—RIGHTS OF HEIRS—TITLE. Property only descends to and vests in the heirs subject to administration, and may be divested by the process of administration. *Bickford v. Stewart* 278

DISCHARGE:

From liability as surety, see PRINCIPAL AND SURETY.

From indebtedness, see RELEASE.

DISCONTINUANCE:

Of action, see DISMISSAL AND NONSUIT.

DISCRETION OF COURT:

Review in civil actions, see APPEAL AND ERROR, 23, 24.

Compelling act within judicial discretion, see MANDAMUS, 2.

DISCRIMINATION:

Special privileges or immunities and class legislation, see CONSTITUTIONAL LAW.

DISMISSAL AND NONSUIT:

At trial, see TRIAL, 3-5.

1. DISMISSAL AND NONSUIT—NECESSARY PARTIES—REFUSING TO BRING IN—RIGHTS OF INTERVENERS. An action to determine the right to the waters of a stream cannot be dismissed on plaintiff's refusal to bring in new parties, after other parties had by leave of court intervened and asked affirmative relief. *In re Clerf* 465

2. DISMISSAL AND NONSUIT—WITHOUT PREJUDICE—FAILURE OF CONDITION PRECEDENT—CONTRACTS—ARCHITECT'S CERTIFICATE. The success-

DISMISSAL AND NONSUIT—CONTINUED.

ful impeachment for fraud of an architect's certificate as to the amount due, which was to be conclusive and a prerequisite to action on the contract, does not entitle the defendant to a final dismissal on the merits, but only to a dismissal without prejudice to another action. *Ilse v. Aetna Indemnity Co.* 487

DISSOLUTION:

Of corporation, see CORPORATIONS, 3.
Of partnership, see PARTNERSHIP.

DISTRIBUTION:

Of estate of decedent, see DESCENT AND DISTRIBUTION.

DIVORCE:

Review of order for suit money, see APPEAL AND ERROR, 3.
Actions for separate maintenance, see HUSBAND AND WIFE, 4, 5.
Estoppel to attack decree, see JUDGMENT, 11.

1. DIVORCE—ACTION TO VACATE—CONCEALMENT OF PROPERTY. A decree of divorce will not be vacated, after the remarriage of the plaintiff, because a large amount of community property had been concealed from the court, and was not disposed of; since the same becomes common property, and can be recovered in a proper action. *Meisenheimer v. Meisenheimer* 32

2. DIVORCE—JUDGMENT—VACATION—IMPOSITION OF TERMS. Where a default judgment of divorce was secured by a wife through fraud, and all the property was awarded to her and in her possession, and it does not appear that the husband has any means, it is error to require the husband to pay $50 suit money as a condition precedent to the prosecution of a petition to vacate the decree. *Pringle v. Pringle* 93

3. DIVORCE—ATTORNEY'S FEES—LIABILITY OF HUSBAND ON CONTRACT OF WIFE. In view of the liberal provisions of the code for suit money in actions for divorce, the husband is not liable for attorneys fees incurred by the wife in instituting a divorce which was settled and dismissed without the attorney's consent. *Humphries v. Cooper* 376

4. SAME—ATTORNEY'S FEES—LIABILITY OF WIFE. The wife is liable to attorneys employed by her to prosecute a divorce suit which was settled and dismissed without their consent. *Humphries v. Cooper* 376

DOCTORS:

See PHYSICIANS AND SURGEONS.

DUPLICITY:

In pleading, see PLEADING, 1.

EASEMENTS:

Necessity for compensation to owner of easement taken for public use, see EMINENT DOMAIN, 2, 3.
Permissive use of way, see HIGHWAYS.
Implied in lease, see LANDLORD AND TENANT, 9.
Rights of abutting owner to access to adjoining street, see MUNICIPAL CORPORATIONS, 22-28.

EDUCATION:

See SCHOOLS AND SCHOOL DISTRICTS.

EJECTMENT:

1. EJECTMENT—IMPROVEMENTS. In ejectment, recovery cannot be had for improvements prior to the betterment law of 1903. *Flueck v. Pedigo* 646

ELECTION OF REMEDIES:

See APPEAL AND ERROR, 39.
For civil contempt, see CONTEMPT.
Instructions, see TRIAL, 11.

1. ELECTION OF REMEDIES—CONTRACTS—BREACH. Upon breach of a contract whereby plaintiff was prevented from completing performance, he may elect to sue on the contract for partial performance and loss of profits, or waive the contract and recover upon *quantum meruit*, but he cannot pursue both remedies. *Gabrielson v. Hague Box & Lumber Co* 342

ELECTIONS:

Sufficiency of title of act requiring registration of voters, see STATUTES, 3, 4.

1. ELECTIONS—PRIMARY ELECTIONS—STATUTES—IMPOSSIBLE CONDITIONS. Laws 1909, p. 174, § 4, amending the direct primary law, Laws 1907, p. 464, § 12, so as to require each elector voting at a primary election to declare his party affiliations, and providing that he shall receive the ballot only of the party for which he registered, is void as requiring a condition impossible of performance; the registration law making no provision for registration of party affiliations. *State ex rel. Arnold v. Mitchell* 513

2. ELECTIONS—STATUTES—IMPLIED REPEALS. Laws 1909, p. 174, § 4, amending the direct primary law, Laws 1907, p. 464, § 12, so as to require the registration of the elector's party affiliations, does not impliedly repeal Bal. Code, § 1455, explicitly providing the mode of registration, as it is not a complete act on that subject and repeals by implication cannot be invoked piecemeal. *State ex rel. Arnold v. Mitchell* 513

EMINENT DOMAIN:

Amendments and presumptions as to evidence, see APPEAL AND ERROR, 22.

Pleading, harmless error in, see APPEAL AND ERROR, 31.

Public improvements by municipalities, see MUNICIPAL CORPORATIONS, 12, 13.

1. SAME—STREETS—PUBLIC USE AND NECESSITY. When the city council, by due ordinance, directed the improvement of streets, the court must determine that the improvement was a public necessity and for a public use. *In re Mercer Street, Seattle.* 116

2. EMINENT DOMAIN—USE OF STREETS—RIGHT OF ABUTTERS—COMPENSATION. An abutting owner cannot be deprived of his right to the use of the full width of the street without just compensation. *Brazell v. Seattle.* 180

3. EMINENT DOMAIN—"PROPERTY"—VACATING STREETS—COMPENSATION. The interest of an abutting property owner in the maintenance of the street is property of which he cannot be deprived until just compensation has been paid. *Smith v. Centralia*..... 573

4. SAME—NECESSITY—ADJOINING STREETS. In condemnation proceedings by a railroad company, it is not necessary to first show that the city had granted a necessary right of way across adjoining streets. *State ex rel. Merriam v. Superior Court* 64

5. SAME—CONDITIONS PRECEDENT—CITY FRANCHISE. The obtaining of a city franchise to cross streets is not a prerequisite for the condemnation of a railroad right of way. *State ex rel. Forney v. Superior Court* 215

6. EMINENT DOMAIN—DEFENSES—ALIENAGE OF STOCKHOLDERS. The objection that the stock of a railroad company seeking to condemn property is held by aliens must be raised by plea in abatement or by proof offered in defense. *State ex rel. Forney v. Sup'r Court* 215

7. EMINENT DOMAIN—PROCEEDINGS—EVIDENCE—ADMISSIBILITY — USE OF RAILROAD PROPERTY. In condemnation proceedings by a railroad company, evidence to show negotiations by the company to trade the land to a city for use as a street in exchange for the vacation of a city street is inadmissible, where a reasonable necessity for the condemnation was shown; since the railroad company could not condemn the land and dispose of it to the city for street purposes. *State ex rel. Merriam v. Superior Court* 64

8. SAME — DAMAGES — EVIDENCE — ADMISSIBILITY — PRICES PAID FOR LAND. In condemnation proceedings, evidence of the prices paid by the petitioner for property in the vicinity is inadmissible on the question of values. *State ex rel. Merriam v. Superior Court* 64

9. SAME—INCREASE. In condemnation proceedings, evidence of a general increase in the value of property is inadmissible on the sub-

EMINENT DOMAIN—CONTINUED.

ject of values, when not limited to the vicinity of the property condemned. *State ex rel. Merriam v. Superior Court* 64

10. SAME—PRICES PAID. In condemnation proceedings, evidence of the prices paid for the property one year previous to the condemnation is admissible on the subject of values. *State ex. rel. Merriam v. Superior Court* 64

11. EMINENT DOMAIN—DAMAGES—EVIDENCE. Upon an issue as to compensation in condemnation proceedings, where damages were claimed by reason of loss of business while buildings were being raised to a new street level, evidence is admissible of the cost of an abutment on the street line which would permit of the use of the buildings without raising them. *In re Mercer Street, Seattle* 116

12. SAME—IMPROVEMENT OF STREETS—RESTRICTION—JUDGMENT. In condemnation proceedings, where damages were claimed by reason of the raising of surrounding streets, on two of which approaches were proposed, extending not exceeding four hundred feet, plans, drawings and the testimony of the city engineer that the approaches were to extend but 163 feet, amount to a stipulation to that effect, and entitled the owner to have the restriction inserted in the judgment awarding damages by reason of the improvement with the approaches restricted to 163 feet. *In re Mercer Street, Seattle*..... 116

14. EMINENT DOMAIN—DAMAGES—APPEAL—REVIEW. The verdict of a jury, awarding damages in a condemnation case, will not be disturbed on appeal when supported by any competent evidence and the jury viewed the premises. *In re Mercer Street, Seattle* 116

15. SAME—PROCEEDINGS—REVIEW—SCOPE. On certiorari to review an adjudication of public use and necessity, objection cannot be made to the setting of the case for trial on the subject of damages. *State ex rel. Forney v. Superior Court* 215

16. EMINENT DOMAIN—PROCEEDINGS—REVIEW—APPEAL OR CERTIORARI. Under the eminent domain act, Bal. Code, § 5645, limiting the right to appeal in proceedings to condemn land to the question of the justness and propriety of the amount of the damages awarded, an intervening public service corporation, claiming a prior public use, whose petition in intervention was dismissed upon the sustaining of a demurrer thereto, occupies the same position as an original party, and is not entitled to prosecute an appeal from the judgment of dismissal before any award of damages, either under the eminent domain act, or the general appeal act, its remedy being by writ of certiorari. *Olympia Light & Power Co. v. Tumwater Power & Water Co.* 392

17. SAME—RIGHTS OF ABUTTERS—INJUNCTION—SPECIAL INJURY. An abutting owner deprived of his right to the use of the full width of the street immediately in front of his lot, by a void order vacating

EMINENT DOMAIN—CONTINUED.

a portion of the street, is specially injured and may maintain an action to enjoin the proceeding, but only so far as it affects his property. *Brazell v. Seattle* 180

EMPLOYEES:

See MASTER AND SERVANT.

ENACTMENT:

Of city ordinances, see MUNICIPAL CORPORATIONS, 1-3.

EQUITY:

See TRUSTS.

Changing form of action from legal to equitable, see ACTION, 1.

Review of facts on appeal in equity, see APPEAL AND ERROR, 29, 30.

Equitable liens, see LIENS.

Foreclosure of maritime liens, see MARITIME LIENS.

Equitable assignment by mortgage of vendee in possession, see MORTGAGES.

Determination of adverse claims to real property, see QUIETING TITLE.

Powers of court, see RECEIVERS.

Relief, mistake of law in listing property, see TAXATION, 2.

ESTATES:

Decedents' estates, see DESCENT AND DISTRIBUTION; EXECUTORS AND ADMINISTRATORS.

Created by will, see WILLS.

ESTOPPEL:

Right to raise question for first time on appeal, see APPEAL AND ERROR, 4-6.

To deny judgment, by causing entry, see APPEAL AND ERROR, 10.

To allege error in civil actions or proceedings, see APPEAL AND ERROR, 19-21.

To dispute location of boundary, see BOUNDARIES.

By election of remedy, see ELECTION OF REMEDIES.

To avoid or sue on insurance policy, see INSURANCE.

By judgment, see JUDGMENT, 9-12.

By laches in bringing suit to trial, see MANDAMUS, 3.

By pleading, misleading party, see MASTER AND SERVANT, 4.

To rescind contract of sale, see SALES, 3.

To object to admission of evidence, see TRIAL, 1, 2.

EVIDENCE:

See ADULTERATION.

Necessity for incorporating evidence in bill of exceptions, see APPEAL AND ERROR, 13.

Review of rulings involving discretion of court, see APPEAL AND ERROR, 24.

EVIDENCE—CONTINUED.
Scope of review of sufficiency of evidence, see APPEAL AND ERROR, 25-30.
Effect of error on appeal, see APPEAL AND ERROR, 32, 33.
For attorney's fee, see ATTORNEY AND CLIENT.
To establish boundaries, see BOUNDARIES.
Employment of broker, see BROKERS, 1, 2.
Of agreement of parties to contract, see CONTRACTS, 2.
Breach of contract, see CONTRACTS, 5.
Of conversion by corporate officer, see CORPORATIONS, 4.
Judicial notice on appeal, see COURTS.
Value of property in condemnation proceedings, see EMINENT DOMAIN, 7-11.
Of value of service of attorney, see EXECUTORS AND ADMINISTRATORS, 4.
To set aside fraudulent conveyance, see FRAUDULENT CONVEYANCES.
Of establishment of highway by prescription, see HIGHWAYS.
Community character of property, see HUSBAND AND WIFE, 1-3.
On contracts of indemnity, see INDEMNITY.
Of insurance policies, see INSURANCE, 1, 5, 9.
Extrinsic evidence as to jurisdictional facts on collateral attack of judgment, see JUDGMENT, 5-7.
In action against landlord for damages through negligence, see LANDLORD AND TENANT, 10.
For libel and slander, see LIBEL AND SLANDER, 10, 11.
For injuries to servant in general, see MASTER AND SERVANT, 2, 3, 5, 10, 11, 15-22.
For money lent, see MONEY LENT.
In action for money received, see MONEY RECEIVED.
Of negligent driving automobile, see MUNICIPAL CORPORATIONS, 32-34.
For negligence, see NEGLIGENCE.
For negligence or malpractice, see PHYSICIANS AND SURGEONS, 2, 3.
To cure defects in pleading, see PLEADING, 2.
Of sale by undisclosed agent, see PRINCIPAL AND AGENT, 2.
In suits to quiet title, see QUIETING TITLE.
Negligence causing injuries to persons at crossings, see RAILROADS.
Of fraud in securing release, see RELEASE.
Of validity of sale, see SALES, 1.
For injuries by street railroads to person on or near tracks, see STREET RAILROADS, 2-6.
For review of assessment, see TAXATION, 1-6.
Effect of admissions on trial as relieving adverse party from necessity of offering proof, see TRIAL, 2.
Questions of fact for jury, see TRIAL, 3-5.
Pleadings as, see TRIAL, 7.
Applicability of instructions to evidence, see TRIAL, 11.
To establish trust, see TRUSTS, 3, 4.
Good faith of purchaser of land, see VENDOR AND PURCHASER, 3-5.
Inconsistent statements to impeach witness, see WITNESSES, 2.

EVIDENCE—CONTINUED.

1. EVIDENCE — JUDICIAL NOTICE — RECORDS. The court cannot take judicial notice of its records in other actions. *Pacific Iron & Steel Works v. Goerig* 149

2. EVIDENCE—DECLARATIONS—RES GESTAE. In an action for damages to a team and wagon in a collision with a street car, a statement made by the conductor of the car on the return trip, three-quarters of an hour later, that the motorman was "green at the business," is an incompetent expression of an opinion, in no way explaining or characterizing the main fact, and hence is inadmissible as res gestae. *Henry v. Seattle Electric Co* 444

3. EVIDENCE—EXPERTS. Objections going to the weight rather than the competency of expert evidence are properly overruled. *In re Mercer Street, Seattle* 116

4. EVIDENCE—OPINIONS—MEDICAL EXPERTS. A hypothetical question to a medical expert may embody the very fact ultimately to be found, where the inference from the facts proven involved a question of medical science on which the expert's opinion was proper. *Helland v. Bridenstine* 470

5. EVIDENCE—OPINION EVIDENCE—MASTER AND SERVANT—COMPETENCY OF FELLOW SERVANT. In a personal injury case, it is inadmissible to allow expert witnesses to give their opinion as to the competency of a fellow servant employed as a powder man, based upon observing his conduct, or knowledge of his experience, since the jury is as capable as the witnesses of drawing the proper inferences from the facts. *Johnson v. Caughren* 125

6. EVIDENCE—OPINIONS—ADMISSIBILITY. It is error to permit a witness to give his opinion as to the competency of a person to drive an automobile, as the jury is capable of drawing the proper inferences from a statement of the facts. *Pantages v. Seattle Electric Co.* 453

EXAMINATION:

Of expert witnesses, see EVIDENCE, 3, 4.

EXCEPTIONS:

Necessity for exceptions for purpose of review, see APPEAL AND ERROR, 4-6.

Time for taking, see APPEAL AND ERROR, 7.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 12, 13.

EXCESSIVE DAMAGES:

See DAMAGES, 5-14.

EXECUTIVE:

Construction of statutes, see STATUTES, 7.

EXECUTORS AND ADMINISTRATORS:

Partition of estate of absentees, see ABSENTEES.

Necessity for distribution to pass title to heirs, see DESCENT AND DISTRIBUTION.

Necessity of administration, see WILLS.

1. EXECUTORS AND ADMINISTRATORS — COMPENSATION — WILLS. Bal. Code, § 6314, providing for commissions on the whole estate accounted for by an executor, where no compensation is provided for in the will or he shall renounce his claim thereto, applies to non-intervention wills, as well as to others. *Shufeldt v. Hughes*.... 246

2. SAME—WAIVER OF COMPENSATION—BURDEN OF PROOF. An executor having a legal right to probate a will without the consent of a widow, the burden of proof is upon her to show an alleged waiver of his statutory commissions under an agreement to accept a flat salary. *Shufeldt v. Hughes*..... 246

3. SAME—LIABILITIES OF ESTATE — ATTORNEY'S FEES — AMOUNT. In determining the amount of an attorney's fee to be allowed an executor, the court will take into consideration the value of the estate and the responsibility involved. *Shufeldt v. Hughes*..... 246

4. SAME. An allowance of $13,000 for the fees of an attorney for an executor is excessive, and $8,750 is sufficient, where it appears that the estate consisted of a city building, its rents, issues and profits, of the value of $600,000, that the attorney was learned in the law, and of thirty years' experience, that he probated the will, made an exhaustive inquiry as to the community nature of the estate, devoted considerable time to the question of the inheritance tax, attended to two suits, carried the estate to final settlement, was paid $1,750 up to the time of the final account, and $7,000 thereafter upon contest of the final account, which had once been vacated upon condition that the executor be allowed to credit on his account all subsequent disbursements, such order being conclusive upon the estate as to the items paid. *Shufeldt v. Hughes*..... 246

EXHIBITS:

Necessity for incorporating in bill of exceptions, see APPEAL AND ERROR, 16.

EXPERT TESTIMONY:

In civil actions, see EVIDENCE, 3-6.

EXPRESS TRUSTS:

See TRUSTS, 4.

FACTORY ACT:

Guarding dangerous machinery, see MASTER AND SERVANT, 3-7, 23.

FALSE PRETENSES:

Defenses, crime under various acts, see CRIMINAL LAW, 1.

1. FALSE PRETENSES—OBTAINING MONEY FOR CHARITY. Obtaining a donation of money as a charity under false representations is within Bal. Code, § 7165, making it an offense to obtain money under false pretenses; the act being within the spirit and intent of the law, which makes no exception. *State v. Swan*..... 97

FEELINGS:

Element of damages, see DAMAGES, 3.

FELLOW SERVANTS:

See MASTER AND SERVANT, 9, 12-14.

FINDINGS:

Review as dependent on exception in lower court, see APPEAL AND ERROR, 7.

Necessity of for review, see APPEAL AND ERROR, 7½.

Review on appeal or writ of error, see APPEAL AND ERROR, 29, 30.

FORBEARANCE:

As consideration for note, see BILLS AND NOTES, 3.

FORECLOSURE:

Of mechanics' lien, see MECHANICS' LIENS.

FOREIGN WILLS:

Probate of, see WILLS.

FORFEITURE:

Of insurance, see INSURANCE.

Of lease, see LANDLORD AND TENANT, 3, 5-8.

FORMS OF ACTION:

See ACTION, 1.

Change of form by amendment, see PLEADING, 4.

FRANCHISES:

As condition precedent to condemnation, see EMINENT DOMAIN, 4, 5.

Use of city streets, see MUNICIPAL CORPORATIONS, 29, 30.

Curative act, construction, see STATUTES, 9.

Sufficiency of title of act granting rights to electric railways, see STATUTES, 2.

For street railway, see STREET RAILROADS, 1.

Taxation of franchises, see TAXATION, 4.

FRANCHISES—CONTINUED.

1. FRANCHISES — COUNTIES — LEGISLATIVE VALIDATION — HIGHWAYS. Laws 1905, p. 210, §§ 2, 3, validating franchises granted by the county commissioners to use county roads or highways "outside the limits" of incorporated cities or towns, to the extent that such roads have been actually occupied prior to the passage of the act, refers to grants made outside of city limits at the time of the attempted grant, and is not limited to franchises granted in territory still under control of the county commissioners at the time of the passage of the act. *Spring Water Co. v. Monroe*..... 195

FRAUD:

As ground for opening or vacating judgment, see JUDGMENT, 8.
Release procured by fraud, see RELEASE.

FRAUDS, STATUTE OF:

Validity of oral contracts, see CONTRACTS, 1.
Validity of oral trusts, see TRUSTS, 3.

1. FRAUDS, STATUTE OF—ORAL SALE OF PERSONALTY. A parol sale of wheat f. o. b. cars, under a general custom in the locality that the title did not pass until delivery on board the cars, is within the statute of frauds. *Peacock Mill Co. v. Honeycutt*..... 18

FRAUDULENT CONVEYANCES:

1. FRAUDULENT CONVEYANCES—GOOD FAITH—EVIDENCE. The evidence is sufficient to support findings of the good faith of an assignment of proceeds of insurance policies to a debtor's brother, where it appears that he held a *bona fide* second mortgage upon the property destroyed by fire, of which the agent was informed when the policies were written, that his claim was recognized by the first mortgagee to whom the policies were payable as his interest might appear, and by the insurance companies before garnishment, and that the assignment and proofs of loss recognizing the same were made before the issuance of the writs of garnishment. *Wheatman v. Kane*.. 226

FUNDING:

Municipal warrants, see MUNICIPAL CORPORATIONS, 36-38.

GARBAGE:

Ordinances respecting, validity, see MUNICIPAL CORPORATIONS, 20, 21.

GIFTS:

From parent to child, see TRUSTS, 1, 2.

GOOD FAITH:

See VENDOR AND PURCHASER, 3-5.
Of purchaser, see BILLS AND NOTES, 1.

GRAFT:

See LIBEL AND SLANDER, 1, 2.

GRANTS:

Of public lands, see PUBLIC LANDS, 1.

GRUB-STAKE:

Oral agreement, see TRUSTS, 3.

GUARANTY:

See INDEMNITY.
Contracts of suretyship, see PRINCIPAL AND SURETY.

GUARDIAN AND WARD:

1. GUARDIAN AND WARD—SALE OF REAL ESTATE—POWER OF GUARDIAN. A guardian's deed of real estate without any order of court is a nullity. *Palmer v. Abrahams*..... 352

HARMLESS ERROR:

See MASTER AND SERVANT, 3.
In civil actions, see APPEAL AND ERROR, 31-36.

HAWKERS AND PEDDLERS:

Validity of laws requiring license, see CONSTITUTIONAL LAW, 3-5.
License of, repugnancy in act, see STATUTES, 8.

1. HAWKERS AND PEDDLERS—LICENSE FEE—REASONABLENESS. An annual county license fee of $100 from peddlers on foot, $150 and $250 from peddlers with one and two horses, and $300 from peddlers with other conveyances, is not excessive, where regarded as an exercise of both the police and taxing power. *McKnight v. Hodge*..... 289

HEALTH:

Adulteration as a public offense, see ADULTERATION.
Health laws as within police power, see CONSTITUTIONAL LAW, 1, 2.
Ordinances respecting garbage, validity, see MUNICIPAL CORPORATIONS, 20, 21.

HEIRS:

See DESCENT AND DISTRIBUTION.

HIGHWAYS:

Appropriation of land abutting on highways, see EMINENT DOMAIN.
Legislative validation of franchise, see FRANCHISES.
Accidents at railroad crossings, see RAILROADS.
Franchise in, curative act, see STATUTES, 9.
Collisions between street cars and vehicles, see STREET RAILROADS.

1. HIGHWAYS—ESTABLISHMENT—PRESCRIPTION. To create a highway by prescription the use or possession must be open, notorious, con-

HIGHWAYS—CONTINUED.

tinuous and adverse; and none is shown where it appears that the use, in all for about eighteen years, was commenced under a temporary grant of a right of way to a county limited to five years, after which time the county refused to expend money because the right of way had expired or was in dispute, until immediately preceding the commencement of the action, over the owners' protest, and that the owners at all times paid taxes thereon, and from time to time maintained gates; since nothing transpired to convert the permissive use into an adverse use. *Scheller v. Pierce County*..... 298

HORSES:

Frightened by automobile, see MUNICIPAL CORPORATIONS, 32-34.
Injuries from fright of, see NEGLIGENCE.

HUSBAND AND WIFE:

Divorce and judicial separation, see DIVORCE.
Mortgage void as to wife, see VENDOR AND PURCHASER, 3.

1. HUSBAND AND WIFE—COMMUNITY OR SEPARATE PROPERTY—EVIDENCE—SUFFICIENCY. It sufficiently appears that property sold by a husband and wife, and later conveyed to the husband, became his separate property, where the wife produced no evidence to contradict the husband's statement that he paid for it out of his separate estate, and from her testimony the conveyance would appear to have been without consideration and a gift to the husband. *Palmer v. Abrahams* 352

2. HUSBAND AND WIFE—COMMUNITY DEBT—LIABILITY OF WIFE—BROKER'S COMMISSIONS. The wife is liable, as a member of the community, upon the husband's contract to pay a commission for securing a loan which was a community debt contracted in the management of the community estate. *Philips & Co. v. Langlow* 385

3. HUSBAND AND WIFE—SEPARATE PROPERTY OF WIFE—MORTGAGE BY HUSBAND. Where land was deeded by the husband to the wife, either before or after marriage, it is her separate property, and not subject to mortgage by the husband alone. *Christopher v. Ferris*..... 534

4. HUSBAND AND WIFE—SEPARATE MAINTENANCE—ACTION—RESIDENCE OF PLAINTIFF. Bal. Code, §§ 5718, requiring residence for one year in this state by the plaintiff in an action for divorce, has no application to actions for separate maintenance. *State ex rel. Lloyd v. Superior Court* 347

5. SAME—ALIMONY IN SEPARATE MAINTENANCE—SUIT MONEY—DENIAL OF MARRIAGE. An order for alimony *pendente lite* and suit money cannot be made, independently of statutory provisions, in an action brought for separate maintenance, where the fact of marriage is denied and the defendant alleges inability to pay. *State ex rel. Lloyd v. Superior Court*..... 347

HYPOTHETICAL QUESTIONS:

In examination of expert witnesses, see EVIDENCE, 4.

IMPEACHMENT:

Of witness, see WITNESSES.

IMPLIED CONTRACTS:

See MONEY LENT; MONEY RECEIVED; WORK AND LABOR.

IMPROVEMENTS:

Allowance or recovery of compensation in ejectment, see EJECTMENT.
On premises demised, see LANDLORD AND TENANT.
Liens, see MECHANICS' LIENS.
Public improvements, see MUNICIPAL CORPORATIONS, 3-19.
Of defendant, in suit to quiet title, see QUIETING TITLE.

INCORPORATION:

See CORPORATIONS, 1; MUNICIPAL CORPORATIONS, 29.

INCUMBRANCES:

See MECHANICS' LIENS; MORTGAGES.

INDEMNITY:

Award of, for civil contempt, see CONTEMPT.
On public works, failure to take bond, see MUNICIPAL CORPORATIONS, 17-19.
Contracts of suretyship, see PRINCIPAL AND SURETY.

1. INDEMNITY—INSURANCE—ACTIONS—CONTRACT—LIMITATION—PLEADING. A limitation in an indemnity bond barring action in case suit is not commenced within four months is waived if not specifically pleaded. *Helmer v. Title Guaranty & Surety Co*..... 558

2. INDEMNITY—INSURANCE—BREACH OF CONDITION—PAYMENT—BURDEN OF PROOF. Where breach of an indemnity bond guaranteeing a building contract is shown by proof of satisfaction of a judgment recovered against the property through default of the contractor, it is not necessary to show failure to indemnify the plaintiff, but the burden of proving payment or performance is on the defendant. *Helmer v. Title Guaranty & Surety Co*..... 558

INDICTMENT AND INFORMATION:

See PERJURY.
Violation of law relating to practice of dentistry, see PHYSICIANS AND SURGEONS, 1.

INFANTS:

See GUARDIAN AND WARD.

INHERITANCE:

See DESCENT AND DISTRIBUTION.

INJUNCTION:

Taking of or injury to private property, see EMINENT DOMAIN, 17.
Making of public improvements, see MUNICIPAL CORPORATIONS, 6, 12, 13.
Enforcement of assessment for public improvements, see MUNICIPAL CORPORATIONS, 12, 13.
Assessment in general, see TAXATION, 2.

INSPECTION:

By master of appliances used by servant as affecting liability for injuries, see MASTER AND SERVANT, 9.

INSTRUCTIONS:

See MASTER AND SERVANT, 7, 13.
Review as dependent on exception in lower court, see APPEAL AND ERROR, 4-6.
Review as dependent on prejudicial nature of error, see APPEAL AND ERROR, 34-36.
Negligence of railroad at crossing, see RAILROADS, 4.
In civil actions, see TRIAL, 5-15.

INSURANCE:

Rebates, note given in violation of law, see BILLS AND NOTES, 2.

1. INSURANCE—AGENCY—AUTHORITY OF AGENT—QUESTION FOR JURY. It is for the jury to determine whether an insurance agent had authority to represent a fire insurance company, where all the negotiations were had with him and he assumed to act as agent for a company whose name was not disclosed until the policy was delivered, countersigned by other agents, and the policy was written by the other agents through him as their intermediary, and the premium paid to him was accepted by the company. *Staats v. Pioneer Insurance Association* 51

2. INSURANCE — POLICY — VALIDITY — ACCEPTANCE OF PREMIUMS — WAIVER OF OBJECTIONS. The acceptance of the premium for a policy through the agent who assumed to act for the company in issuing the policy, with all knowledge of the facts, affirms the validity of the policy, and waives all objections that the insurance never took effect. *Staats v. Pioneer Insurance Association*..... 51

3. INSURANCE—POLICY—STIPULATIONS AGAINST WAIVER—AGENTS—AUTHORITY. A clause in an insurance policy that no agent is authorized to waive proofs of loss or admit liability, does not prevent the waiver of clauses in the policy at the time of its issuance and the acceptance of the premium. *Staats v. Pioneer Insurance Association*..... 51

INSURANCE—CONTINUED.

4. INSURANCE—STIPULATION AGAINST OTHER INSURANCE—WAIVER. A clause in a policy of fire insurance against other insurance is waived where, at the time the policy was issued, other insurance on the property was disclosed to the agent to the extent of $4,000; and the waiver is not affected by the fact that a "rider" was attached, expressly consenting to $2,000 additional concurrent insurance. *Staats v. Pioneer Insurance Association*..... 51

5. INSURANCE—POLICY—NOTICE OF OTHER INSURANCE—ORAL EXPLANATIONS—EVIDENCE—ADMISSIBILITY. In an action on a policy of fire insurance stipulating against other insurance, to which a rider was attached authorizing $2,000 additional concurrent insurance, when, at the time of delivery of the policy, the insured already had $4,000 of other insurance on the property, parol evidence is admissible of the statements of the agent explaining that the prohibitory clause did not relate to "prior" insurance, and that the rider was intended to authorize $2,000 in addition to what the insured already had on the property, for the purpose of showing notice to the agent of such other insurance. *Staats v. Pioneer Insurance Association*..... 51

6. INSURANCE — POLICY — LIMITATION OF TIME FOR SUIT — VALIDITY. The clause in a fire insurance policy that no action shall be sustainable unless commenced within six months, is valid as a limitation, but does not go to the question of original liability. *Staats v. Pioneer Insurance Association*..... 51

7. SAME—WAIVER OF LIMITATION—AUTHORITY OF AGENT—ESTOPPEL. The clause in a fire insurance policy that no action shall be sustainable, unless commenced within six months after the fire, is waived, where the insured was induced to postpone action by the representations of the adjuster that he found the claim honest, and that the insurer would do whatever the other companies did, if he would wait until they acted, the adjuster being clothed with apparent authority to act for the insurer. *Staats v. Pioneer Insurance Association*. 51

8. SAME—LACHES—DELAY IN BRINGING SUIT AFTER WAIVER. Where an insurance company waived the six months time limit for commencing suit until other companies had settled, a delay of twenty-five days thereafter is not, as a matter of law, so unreasonable as to preclude a recovery. *Staats v. Pioneer Insurance Association* 51

9. INSURANCE — ACTIONS — PLEADINGS — ESTOPPEL — AMENDMENTS TO CONFORM TO PROOF. Where evidence of an estoppel or waiver as to a clause forfeiting an insurance policy is admitted without objection, the plaintiff's pleadings will be deemed amended to properly set up the estoppel. *Staats v. Pioneer Insurance Association*..... 51

INTEREST:

Inclusion of accumulated interest on reassessment for public improvements, see MUNICIPAL CORPORATIONS, 9.

INTERROGATORIES:

To jury, see TRIAL, 17-19.

INTERVENTION:

Rights of interveners, as against voluntary dismissal, see DISMISSAL AND NONSUIT, 1.

ISSUES:

Identity of issues, res judicata, see JUDGMENT, 9, 10, 12.
On contract of sale, see SALES, 4.

JOINDER:

Of causes of action, see ACTION, 2.
Of parties on appeal, see APPEAL AND ERROR, 8.

JOINT TENANCY:

Coparcenary, see TENANCY IN COMMON.

JUDGES:

Duty as to certification of statement of facts, see APPEAL AND ERROR, 14.
Power to hear motion in another county, see COURTS, 3.
Mandamus to judge, see MANDAMUS.

JUDGMENT:

Motion to vacate, pleaded to abate action, see ABATEMENT AND REVIVAL.
Review in general, see APPEAL AND ERROR.
Effect of motion to vacate judgment on time to appeal, see APPEAL AND ERROR, 10.
As fixing time for taking proceedings for review, see APPEAL AND ERROR, 9.
Review of discretion to vacate judgment, see APPEAL AND ERROR, 23.
Conclusiveness, see APPEAL AND ERROR, 37, 38.
On appeal, see APPEAL AND ERROR, 37-39.
Disobedience of order by one not party as contempt, see CONTEMPT, 4.
Of dismissal or nonsuit, form, see DISMISSAL AND NONSUIT.
Vacation of decree of divorce, see DIVORCE, 1, 2.
Condemnation proceedings, see EMINENT DOMAIN, 12.
Order or decree stating account of executor or administrator, see EXECUTORS AND ADMINISTRATORS, 4.
Conclusiveness on indemnitor of judgment against person indemnified, see INDEMNITY, 2.
Foreclosure of mechanic's lien, see MECHANICS' LIENS, 2.
In suits to quiet title, see QUIETING TITLE.
On the pleadings, see SALES, 6.
On decision of board of review of assessment, see TAXATION, 5.
Sale of land for nonpayment of tax, see TAXATION, 14, 17-19.

JUDGMENT—CONTINUED.

1. JUDGMENT—DEFAULT—APPEARANCE—TIME. A demand for a bill of particulars, made after defendant is in default and while a motion for a default is pending, comes too late and does not prevent judgment by default. *General Lithographing & Printing Co. v. American Trust Co*..... 401

2. JUDGMENT—DEFAULT—NOTICE—APPEARANCE. After entry of default for failure to appear and answer in time, the defendant is not entitled, by reason of later appearance, to notice of application for judgment, under Bal. Code, § 5090, entitling him to five days' notice of proceedings if he gives notice of appearance before the time for answering expires. *General Lithographing & Printing Co. v. American Trust Co*..... 401

3. JUDGMENT—DEFAULT—VACATION—MERITS. The denial of a motion to vacate a default judgment will not be disturbed when there was no showing of merits on the motion to vacate. *General Lithographing & Printing Co. v. American Trust Co*..... 401

4. JUDGMENT — DECISION AS TO JURISDICTION — COLLATERAL ATTACK. Where a party appears specially to object to a proceeding for want of due service, and the court, having jurisdiction of the subject-matter, decided that due service was made and that it has jurisdiction to proceed to judgment on the merits, such judgment cannot be collaterally attacked for want of service. *Meisenheimer v. Meisenheimer* 32

5. JUDGMENTS — RECITALS—PRESUMPTIONS—FINDINGS OF FACT. The rule that recitals in a judgment showing jurisdictional facts raise a presumption of jurisdiction has no application to recitals in findings of fact, especially in an equity case where findings are not necessary. *Holly v. Munro*..... 311

6. SAME — EVIDENCE OF SERVICE — PRESUMPTIONS. The presumption from recitals of due service of process in a judgment is only *prima facie* and may be overcome by proof that none other than the void summons on file was served. *Holly v. Munro*..... 311

7. JUDGMENT — RECITALS — EVIDENCE TO OVERCOME PRESUMPTION OF JURISDICTION. Proof that defendants did not appear, were not personally served, and a record showing nothing but the publication of summons void on its face, is sufficient to overcome the presumption from recitals in the judgment of due service, and shifts the burden of proof, in a direct attack on the judgment; as the same is only a *prima facie* presumption. *Hembree v. McFarland*..... 605

8. JUDGMENT — VACATION — FRAUD OF ATTORNEY — ERROR OF LAW. A judgment will not be vacated because of collusion of the party's attorney in stipulating to dismiss an appeal, where it appears that he only made an error of law, "intending to bring another action," which however was barred by the former judgment. *Meisenheimer v. Meisenheimer* 32

JUDGMENT—CONTINUED.

9. JUDGMENTS—VALIDITY—COLLATERAL ATTACK. A judgment entered by the lower court after remand of the case on appeal, upon determination of the prior right to booming privileges, cannot be collaterally attacked or disregarded because of error in fixing the boundaries of the boom grounds; since that question was within the jurisdiction of the court to decide. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co*..... 1

10. JUDGMENT — VACATION — CONCLUSIVENESS — MOTION AS BAR TO ACTION. Where a motion to vacate a judgment is made within one year, under Bal. Code, §§ 5153, 5156, and the motion is denied and no appeal taken, the order is *res judicata* and a bar to an independent action to vacate the judgment on the same grounds. *Meisenheimer v. Meisenheimer*..... 32

11. JUDGMENT — ESTOPPEL BY RECORD—PARTIES—CRIMINAL AND CIVIL CASES. A husband who had obtained a divorce is not estopped from asserting the validity of the decree, when attacked by the wife, by the fact that he successfully defended a prosecution for perjury in obtaining the divorce by insisting that the evidence showed the judgment of divorce to be void for want of due service of process; since the parties were not the same in the two proceedings. *Meisenheimer v. Meisenheimer*..... 32

12. JUDGMENT—RES JUDICATA—DENIAL OF MOTION TO VACATE—BAR. An order denying a motion by parties not served to vacate a tax foreclosure judgment, void because taken without notice and by mistake, heard on the merits and not appealed from, is *res judicata* and a bar to a subsequent action by one claiming under such parties, to the extent of their interests; and it is immaterial that the motion to vacate was upon a special appearance or that the defect rendered the judgment void. *Flueck v. Pedigo*..... 646

JUDICIAL NOTICE:

Of court records, see COURTS, 1.
In civil actions, see EVIDENCE, 1.

JUDICIAL SALES:

Of property of infant, see GUARDIAN AND WARD.
Of land for nonpayment of taxes, see TAXATION, 8, 9, 15, 16, 18-21.

JURISDICTION:

Of different judges, see COURTS, 2, 3.
Want of jurisdiction as ground for collateral attack on judgment, see JUDGMENT, 4-7.
Validity of judgment dependent on jurisdiction of the person, see JUDGMENT, 4-7.
On failure of lien, see MECHANICS' LIENS, 1.
Of court to charge costs of receivership against property, see RECEIVERS.

JURY:

Right to jury of vicinage, see CRIMINAL LAW, 4.
Verdict in condemnation proceedings, see EMINENT DOMAIN, 14.
Right to jury trial, see MECHANICS' LIENS, 1.
Taking case or question from jury at trial, see TRIAL, 3-5.
Instructions in civil actions, see TRIAL, 5-15.

JUSTIFICATION:

Of actionable words, see LIBEL AND SLANDER, 8-10.

KNOWLEDGE:

Defenses to bills or notes, see BILLS AND NOTES, 1.
Servant's knowledge of defect or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 16-23.

LABOR:

See WORK AND LABOR.

LACHES:

In bringing case to trial, see MANDAMUS, 3.
In bringing suit, see MARITIME LIENS, 5.
Estoppel to rescind sale, see SALE, 3.
Of owner in setting aside tax sale, see TAXATION, 20.

LANDLORD AND TENANT:

1. LANDLORD AND TENANT—LEASE—SURRENDER — DISCLAIMING INTEREST. A lease with option to purchase is shown to be abandoned and mutually surrendered, where on the insolvency of the lessee, its president acquired the lease by assignment and removed the buildings, and in an action by the lessors to enjoin the removal of the buildings, the assignee filed an answer disclaiming any interest in the lease, whereupon the lessors abandoned the suit, relying on the answer as a surrender, retook possession, and refused subsequent tenders of rent. *Sandberg v. Light*..... 189

2. SAME—OPTION TO PURCHASE—RIGHT TO EXERCISE—CONTINUANCE OF LEASE. An option to purchase, contained in a lease with renewal privileges, expires on any termination of the lease, without any express stipulation that time is of its essence, the continuance of the lease being essential to the option. *Sandberg v. Light*..... 189

3. LANDLORD AND TENANT—LEASES—RENT—REENTRY. Default in the payment of rents, and reentry by the landlord under process in an action for unlawful detainer, works a forfeiture of all right to rents subsequently earned. *Toellner v. McGinnis*..... 430

4. LANDLORD AND TENANT—LEASE — COVENANTS — CONSTRUCTION. A stipulation in a lease requiring a landlord to pay the lessee for improvements, at the end of the term, is one for compensation, and the intent of the parties, construing the lease as a whole, determines

LANDLORD AND TENANT—CONTINUED.

whether the same is dependent upon the payment of rents, irrespective of the fact that the improvements have become part of the real estate. *Toellner v. McGinnis* 430

5. LANDLORD AND TENANT—LEASE—DEPENDENT COVENANTS—IMPROVEMENTS AND RENT—FORFEITURE OR ABANDONMENT. Where a lease for a term of years, at a stipulated ground rent payable monthly with right of reentry in case of default, provides that the lessees shall erect a building which shall become the property of the lessors at the end of the term upon payment of a sum equal to two-thirds of its value, the covenant to pay rent and the covenant to pay for the building are mutual and dependent, and the lessee cannot, after abandonment or forfeiture for condition broken and reentry, recover the value of the building or any part thereof. *Toellner v. McGinnis* 430

6. SAME—COMPENSATION FOR IMPROVEMENTS—FORFEITURE—PENDENCY OF ACTION. The forfeiture of the lessees' right to compensation for a building erected by them, under the terms of the lease, by reason of default in payments of rents and reentry by the landlord, is not affected by the fact that an action for unlawful detainer is pending and undetermined, where it appears that the lessees admitted their purpose to pay no more rent and did nothing in the detainer action to tender rent, protect their interests, or prevent reentry. *Toellner v. McGinnis* 430

7. SAME—COMPENSATION FOR IMPROVEMENTS—ACTIONS—LIMITATIONS—REENTRY. Where a lease for a term of years, with right of reentry for nonpayment of ground rents, stipulated that the lessors should at the end of the term, pay two-thirds of the value of a building erected by the lessees, and the lease was terminated before the expiration of the term by the nonpayment of rent and reentry, an action by lessees for compensation for the building under the terms of the lease is barred by the lapse of six years after the reentry. *Toellner v. McGinnis* 430

8. LANDLORD AND TENANT — LEASE — COVENANTS — FORFEITURE. The fact that a lease, with right of reentry for condition broken, contains no forfeiture clause, does not prevent a forfeiture of the lessees' right to compensation for improvements, upon reentry for nonpayment of rents, where the stipulation for rents and for compensation were mutual and dependent covenants. *Toellner v. McGinnis*... 430

9. LANDLORD AND TENANT—LEASE — APPURTENANCE — IMPLIED EASEMENT—SIDE ENTRANCE. Where a lease of a room for a restaurant, in a hotel building, which had a front entrance on the street, and a side entrance into the lobby of the hotel which was a convenience but not necessary to the beneficial use of the property, the side entrance is not an appurtenance and there is no implied easement rendering the landlord liable in damages for closing the same. *Jemo v. Tourist Hotel Co.* 595

LANDLORD AND TENANT—CONTINUED.

10. DAMAGES — TO LEASED PREMISES — APPROXIMATION — EVIDENCE — SUFFICIENCY. Damages need not be shown with precision and accuracy, and a verdict for $250 for damages to leased premises, by reason of negligence of the landlord in repairing a building, is not unsupported or based on conjecture, where the walls were injured and the place of business closed while tenants made repairs, at an expense estimated by them at five or six hundred dollars. *Jemo v. Tourist Hotel Co*..... 595

LANDS:

See PUBLIC LANDS.

LAW OF THE CASE:

See APPEAL AND ERROR, 37, 38.
Res adjudicata, see JUDGMENT, 9.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

Vacation of streets, control by courts, see MUNICIPAL CORPORATIONS, 27.
Franchise in streets, see MUNICIPAL CORPORATIONS, 30.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER—PUBLICATIONS ACTIONABLE PER SE—GRAFT IN OFFICE. A newspaper publication falsely charging a city inspector of sidewalks with being part of a system of jobbery and graft in the management of city contracts, is libelous *per se*, since it imputes criminal offenses or moral delinquency in office tending to bring him into public hatred, contempt, or ridicule. *Quinn v. Review Publishing Co*..... 69

2. SAME—WORDS AND PHRASES—"GRAFT." A charge of "graft" in a libelous publication implies a dishonest or corrupt transaction in office. *Quinn v. Review Publishing Co*..... 69

3. LIBEL AND SLANDER—LIBEL PER SE—CREDIT REPORTS. The report of a mercantile agency is not libelous *per se*, where it simply gave plaintiff a rating which is stated not to be a credit rating, but that the agency preferred to furnish information upon application at the office; since the words are to be considered in their natural sense, are innocent without the aid of special knowledge, and do not imply malice, or hold the party up to public ridicule or involve moral turpitude. *Denney v. Northwestern Credit Association*..... 331

4. SAME—CREDIT REPORT TO COERCE PAYMENT. It cannot be said, as a matter of law, that such a publication was made to extort money or coerce payment of a debt held by the agency for collection so as

LIBEL AND SLANDER—CONTINUED.

to make the same libelous *per se*, within the rule allowing a recovery in the case of publications showing blackmail on their face. *Denney v. Northwestern Credit Association*..... 331

5. SAME—SPECIAL DAMAGES—PLEADING. In order to render such a publication actionable, the words not being libelous *per se*, the special damages resulting from loss of credit must be specifically set out, showing the names of parties refusing credit or withdrawing custom, or that it is impossible to do so. *Denney v. Northwestern Credit Association* 331

6. LIBEL AND SLANDER—COMMUNICATIONS LIBELOUS PER SE. It is libelous *per se* for the physicians in an office building to sign and publish a petition to the owners of the building reciting that they as reputable physicians, desiring to uphold the honor of their profession, demanded the removal from the building of osteopaths . . . criminal practitioners . . . fakirs, quacks, charlatans and other fraudulent concerns and . . . undesirable tenants, intending to refer to the plaintiff, who was a duly licensed osteopath having an office in the building. *Lathrop v. Sundberg*..... 144

7. SAME—PRIVILEGED COMMUNICATIONS — INTEREST — ABUSE OF PRIVILEGE. Such a publication is not privileged from the fact of the interest of the parties; and the publication of the same in the newspapers would be an abuse of any privilege; also, an abuse in going beyond the necessities of the case. *Lathrop v. Sundberg*..... 144

8. SAME—PRIVILEGED COMMUNICATIONS—FALSE ACCUSATION OF OFFICER. Where a newspaper charge of "graft" respecting a public officer is found to be false, it is without the rule of privilege, and actionable, although made in good faith. *Quinn v. Review Publishing Co.* 69

9. LIBEL AND SLANDER—DEFENSES—TRUTH. The truth of published statements concerning a public officer is a defense to an action for libel. *Quinn v. Review Publishing Co*..... 69

10. SAME—DEFENSES—TRUTH—EVIDENCE—SUFFICIENCY. The truth of a newspaper publication charging a city sidewalk inspector with graft and jobbery is not necessarily established by evidence that many sidewalks were poorly constructed and not up to the requirements of the contracts and that the inspector had been discharged for incompetency, the same being competent but not conclusive evidence. *Quinn v. Review Publishing Co*..... 69

11. SAME—MITIGATION—EVIDENCE—ADMISSIBILITY. A libelous publication in a newspaper is not mitigated or cured by another article in the same issue, and the latter is properly excluded. *Quinn v. Review Publishing Co*..... 69

12. LIBEL AND SLANDER—PERSON REFERRED TO—PLEADING—COMPLAINT—SUFFICIENCY. A complaint in an action for libel fails to show that

LIBEL AND SLANDER—CONTINUED.

it was published of and concerning the plaintiff, a reputable and duly licensed physician, where the complaint alleges that the defendants, as physicians in an office building, signed and published a petition to the owners of the building reciting that they, as reputable physicians, desiring to uphold the honor of their profession, demanded the removal from the building of osteopaths . . . . criminal practitioners, medical institutes; advertising specialists, patent medicine fakirs, quacks, charlatans and other fraudulent concerns, and demanded the removal of all such persons and undesirable tenants, although the complaint further alleges that defendant intended thereby to refer to the plaintiff, who was not mentioned in the petition, and whom the complaint alleges to be a reputable and duly licensed physician. *Dunlap v. Sundberg*..... 609

13. SAME. Bal. Code, § 4938, providing that in libel it is not necessary to state in the complaint any extrinsic facts to show the application of the libel to the plaintiff, but it shall be sufficient to state such fact generally, does not obviate the necessity of pleading that the publication was so understood by persons seeing it; and a complaint is insufficient, although it contains such general allegation, where it negatives the fact that plaintiff was referred to in the defamatory matter. *Dunlap v. Sundberg*..... 609

LICENSES:

For hawkers and peddlers, validity of statute, see CONSTITUTIONAL LAW, 3-5.

Of hawkers and peddlers, see HAWKERS AND PEDDLERS.

Physicians and surgeons, see PHYSICIANS AND SURGEONS, 1.

Of peddlers, repugnancy in act, see STATUTES, 8.

Construction of ditch, see WATERS AND WATER COURSES, 1-4.

LIENS:

Maritime liens, see MARITIME LIENS.

Liens of mechanics and materialmen, see MECHANICS' LIENS.

For labor and materials on public improvements, see MUNICIPAL CORPORATIONS, 18, 19.

1. LIENS—ADVANCEMENTS—MISAPPROPRIATION OF FUNDS. Small advancements of money to defendant to be invested in real estate for plaintiff, do not impress a lien on specific real estate previously purchased by the defendants, by reason of plaintiff's use of the money to pay portions of a note secured by mortgage on the property, when the time elapsed and the small amounts preclude the idea that they were furnished to invest in any particular tract. *Christopher v. Ferris* 534

LIMITATION:

Of indebtedness and expenditures of municipality, see MUNICIPAL CORPORATIONS, 37.

LIMITATION OF ACTIONS:

See ADVERSE POSSESSION.
Time for taking appeal or other proceeding for review, see APPEAL AND ERROR, 9, 10.
Waiver by failing to plead, see INDEMNITY, 1.
Provisions in insurance policies as to time for commencement of actions, see INSURANCE, 6-8.
Compensation of lessee for improvements, see LANDLORD AND TENANT, 7.
Laches in bringing suit, see MARITIME LIENS, 5.
To compel reassessments, see MUNICIPAL CORPORATIONS, 10, 16, 16½.
Action by owner to set aside tax proceedings, see TAXATION, 20.

1. LIMITATION OF ACTIONS—MONEY COLLECTED ON ERRONEOUS JUDGMENT—ACCRUAL—PENDENCY OF APPEAL. Where a judgment upon a bail bond in favor of a county was collected on execution, and afterwards reversed on appeal and the action dismissed, limitations upon the right of action against the county to recover the money collected do not commence to run until the reversal of the judgment; since until that time the former judgment could be pleaded in bar and no action could have been maintained. *Green v. Spokane County*... 308

LIQUIDATED DAMAGES:

See DAMAGES, 1.

LISTING:

Property for taxation, see TAXATION, 1, 2.

LIVE STOCK:

Carriers of, see CARRIERS.

LOAN OF CREDIT:

See MUNICIPAL CORPORATIONS, 38.

LOANS:

Recovery of money loaned, see MONEY LENT.

LOCAL ASSESSMENTS:

For local improvements, see MUNICIPAL CORPORATIONS, 5-17.

LOGS AND LOGGING:

1. LOGS AND LOGGING—CONTRACTS—CONSTRUCTION. In the absence of positive testimony or proof of custom, one who contracts to remove and deliver timber is presumed to supply all necessary means and appliances, and cannot recover on a *quantum meruit* for building a logging road to facilitate his operations. *Gabrielson v. Hague Box & Lumber Co*..... 342

MAINTENANCE:

Right of wife to allowance for maintenance, see HUSBAND AND WIFE, 4, 5.

MALPRACTICE:

Measure of damages, see DAMAGES, 3.
Excessive verdict, see DAMAGES, 5.
By physicians, see PHYSICIANS AND SURGEONS, 2, 3.

MANDAMUS:

To compel certification of statement of facts, see APPEAL AND ERROR, 15.

1. MANDAMUS—WHEN LIES—CHANGE OF VENUE—REMEDY BY APPEAL. The remedy by appeal is inadequate, and mandamus lies to correct an improper change of venue; since the supreme court cannot assume that jurisdiction will be assumed in the wrong county; nor on appeal from a judgment in such county, direct a trial in the proper county. *State ex rel. Scougale v. Superior Court*..... 328

2. MANDAMUS—REMEDY BY APPEAL—TO CONTROL ACTIONS OF COURT—DISCRETION. Mandamus will not lie to compel a court to render a decision in a cause where, after trial and submission, the court found that other parties were necessary to a complete determination of the case, and ordered them brought in; since the court is exercising its discretion and not refusing to proceed with the cause; and the remedy for error, if any, is by appeal from the final judgment. *In re Clerf*..... 465

3. SAME—REFUSING TO PROCEED WITH CAUSE—ESTOPPEL. A plaintiff who misleads the court as to her course, after being ordered to bring in new parties, delaying many months without action, is not in a position to complain of the dilatoriness of the trial judge, where he proceeded with reasonable diligence as soon as plaintiff's refusal to bring in new parties was made known. *In re Clerf*..... 465

MARITIME LIENS:

1. MARITIME LIENS—MATERIALS FURNISHED UNDER CONDITIONAL SALE—STATUTES—CONSTRUCTION. The lien upon vessels for material furnished in their construction or repair in this state, given for three years by Bal. Code, § 5953, is not affected by the fact that a conditional bill of sale was given for marine engines furnished for a ship, the title to the engine being retained by the vendor as security, and that the bill of sale was not filed pursuant to Laws 1903, p. 6, providing that a conditional bill of sale not filed within ten days shall be absolute as to subsequent incumbrancers in good faith; since the lien given by Bal. Code, § 5953, attaches whether the sale was absolute or conditional. *Fairbanks-Morse Co. v. Union Bank & Trust Co.*..... 538

MARITIME LIENS—CONTINUED.

2. SAME—CONDITIONAL SALES AS WAIVER OF LIEN. The vendor of a marine engine furnished for a ship does not waive a lien given upon the ship, her tackle, apparel, etc., by reserving a specific lien upon the engine by means of a conditional bill of sale, since retention of title is not inconsistent with the lien and does not waive statutory liens. *Fairbanks-Morse Co. v. Union Bank & Trust Co*..... 538

3. SAME—WAIVER OF LIEN—ADDITIONAL SECURITY. The rule that retention of additional security waives statutory liens does not apply to maritime liens under Bal. Code, § 5953, because the rule is founded upon the theory that subsequent creditors rely upon the records, and under this statute no record notice of the lien is provided for. *Fairbanks-Morse Co. v. Union Bank & Trust Co*..... 538

4. SAME—MARITIME LIEN WITHOUT NOTICE—POSSESSION OF ARTICLE. The lien given by Bal. Code, § 5953 upon a vessel, her tackle, apparel, etc., for three years, without the filing of any notice, is not merely declaratory of the common law and dependent upon retaining possession, since the statute contemplates delivery of possession to the owner of the ship and gives a lien upon articles never in the possession of the claimant. *Fairbanks-Morse Co. v. Union Bank & Trust Co.* 538

5. SAME—TIME FOR ENFORCEMENT—NOTICE—LACHES. The lien upon a vessel given by Bal. Code, § 5953, for materials furnished is not lost by laches in failing to give notice or to assert the lien when action is taken within the three years allowed by the statute. *Fairbanks-Morse Co. v. Union Bank & Trust Co*..... 538

MARRIED WOMEN:

See HUSBAND AND WIFE.

MASTER AND SERVANT:

Opinion evidence as to competency of fellow servant, see EVIDENCE, 5. Release of liability of master, see RELEASE.

1. SAME—COAL MINES. The duty of a master to supply a safe place in which to work applies to a coal mine where the miners put in props to secure safety under the direction and control of a pit boss who supervised and inspected the work. *McKenzie v. North Coast Colliery Co.* 495

2. SAME—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCE—MACHINERY IN COMMON USE—QUESTION FOR JURY. The negligence of the master in using a lever to start a carriage in a mill which was not provided with any guard, clutch, or contrivance to hold the lever stationary and prevent its falling and accidentally starting the carriage, is for the jury, notwithstanding testimony that the machine was as manufactured and advertised and in common use, where that evidence

MASTER AND SERVANT—CONTINUED.

was disputed and there was other testimony that a simple, inexpensive guard in common use would reduce the danger of operation. *Smith v. Hewitt-Lea Lumber Co*..... 357

3. MASTER AND SERVANT—NEGLIGENCE OF MASTER—APPLIANCES—FACTORY ACT—NOTICE—SUFFICIENCY. Where an employee was injured while assisting to place a belt upon a pulley, his notice of the injury stating that he came to work at 6:30 p. m. on a certain date, that one C. started the motor, the belt slipped off, C. shut off the power, and while trying to put on the belt, his hand was caught, is sufficient under the factory act, Laws 1905, p. 169, § 9, allowing recovery for failure to provide proper belt shifters, etc., if "notice of the time, place and cause of injury is given the employer within six months"; since the purpose of the law to give notice of the time, place and cause is fulfilled, and technical accuracy is not required. *Berger v. Metropolitan Press Printing Co*..... 422

4. SAME—NOTICE UNDER THE FACTORY ACT—ESTOPPEL TO OBJECT. Such a notice is especially sufficient to authorize a recovery under the factory act, where it was prepared at a meeting by appointment with the defendant, retained without objection, and a few days later plaintiff asked for a copy, which was refused, and the defendant did not affirmatively allege a defective notice, but merely denied the giving of any notice and misled the plaintiff as to the issue. *Berger v. Metropolitan Press Printing Co*..... 422

5. SAME—NEGLIGENCE OF MASTER—APPLIANCE—FACTORY ACT—EVIDENCE—SUFFICIENCY. There is sufficient evidence to make a question for the jury for failure to furnish proper belt shifters, etc., under the factory act, where a press feeder, outside of his regular employment, was injured while assisting to put on a belt which was defective, curled up at the edges, and running on crooked pulleys which tended to throw it off, and he was inexperienced and unaware of the defective conditions. *Berger v. Metropolitan Press Printing Co*.. 422

6. MASTER AND SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE APPLIANCE—GUARDS—FACTORY ACT. A master is not relieved from the duty of properly safeguarding saws and so "maintaining" them, as required by the factory act, by the fact that various servants, from time to time, removed the safeguards supplied, to suit their own convenience, where the injured servant did not do so, and was ordered to work upon an unguarded saw. *Benner v. Wallace Lumber & Mfg. Co*..... 679

7. MASTER AND SERVANT—APPLIANCES—GUARDING MACHINERY—FACTORY ACT—PRIMA FACIE CASE—INSTRUCTIONS—HARMLESS ERROR. In an action for personal injuries sustained by a knot-sawyer while at work upon an unguarded saw, it is not prejudicial error to refuse to give defendant's requested instruction that the posted certificate of inspection of the labor commissioner was *prima facie* evidence of

MASTER AND SERVANT—CONTINUED.

compliance with the factory act requiring the guarding of saws (made so by statute), where there was much evidence that the saw in question was not guarded and the defendant had introduced evidence, including that of the inspector himself, to show that it was properly guarded; the *prima facie* case thereby becoming immaterial. *Benner v. Wallace Lumber & Mfg. Co*..... 679

8. SAME—SAFE PLACE—DUTY OF INSPECTION—PLEADING AND PROOF. Under a complaint by a coal miner for negligence in not supplying a safe place to work, the walls of the mine having fallen in, evidence as to the master's duty to make an inspection is admissible, since the duty to furnish a safe place necessarily requires inspection. *McKenzie v. North Coast Colliery Co*..... 495

9. SAME—SAFE PLACE—PREPARATION BY OTHER SERVANTS. While the master is not an insurer, a coal miner working in one battery, and injured by the fall of walls in another battery where the propping was negligently done by other miners, may recover on the theory that the master guarantees the safety of the place to work prepared by him. *McKenzie v. North Coast Colliery Co*..... 495

10. MASTER AND SERVANT—SAFE PLACE—DUTY TO WARN—NEGLIGENCE OF MASTER—EVIDENCE—SUFFICIENCY. There is no evidence of negligence warranting a recovery for failure to furnish a safe place to work or in requiring dangerous work without instructions, where it appears that plaintiff, employed for six months in a foundry, was injured while helping twenty to thirty men push a heavy car loaded with flasks into the oven, in the same manner as was done every day, that the car was properly loaded, the place light and free from any danger except the obvious one of placing hands in open places between the moulds, that there was sufficient hand holds without using the place of danger, and that the men were repeatedly warned not to place their hands in the open spaces in pushing, because of danger to the hands and injury to the moulds, although no particular warning was given on that occasion, and the plaintiff testified that he was unacquainted with the English language and did not appreciate the dangers. *Vianello v. Washington Iron Works Co*..... 552

11. SAME—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In such a case, the employee is guilty of contributory negligence precluding any recovery, as a matter of law, where he placed his hands in an open space between the moulds, which was apparently exceedingly dangerous. *Vianello v. Washington Iron Works Co*..... 552

12. MASTER AND SERVANT—NEGLIGENCE—AUTHORITY OF COSERVANT—PRESUMPTION. In an action for injuries sustained through the giving way of a swamp hook set in a stump to hold a lead line, it will be presumed, in the absence of evidence, that the hook was set by a hook tender duly authorized by the defendant. *Hoseth v. Preston Mill Co*..... 416

MASTER AND SERVANT—CONTINUED.

13. MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPALS—INSTRUCTIONS. It is not error to refuse requested instructions to the effect that the jury could only find negligence from the setting of a swamp hook if the fact "was known to the defendant's foreman in charge of the plaintiff," or could have been known and remedied by the foreman by the exercise of reasonable care, where the court instructed that the defendant was not liable if it used due and reasonable care in the selection of a reasonably safe swamp hook; since a hook tender in selecting or setting the swamp hook would be performing a nondelegable duty of the master. *Hoseth v. Preston Mill Co.* 416

14. SAME—FELLOW SERVANTS—PIT BOSS AND MINERS. A pit boss in a coal mine is not a fellow servant, but is a vice principal, of miners with reference to the putting in of props under his direction and control. *McKenzie v. North Coast Colliery Co*..... 495

15. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—SCOPE OF EMPLOYMENT—EVIDENCE—SUFFICIENCY. In an action for personal injuries sustained by an oiler in a mill, caught by the automatic starting of a carriage, the evidence does not show, as a matter of law, that he was guilty of contributory negligence, or was loitering about as a volunteer, instead of in the performance of his duties, from the fact that, while he was on his way to oil machinery, he was momentarily interrupted by a sawyer who informed him that the machinery was stalled, and that he looked at the friction and advised the sawyer, where it further appears that, after a momentary interruption and show of interest that was natural under the circumstances, he was going on about his duty at the time he was injured. *Smith v. Hewitt-Lea Lumber Co*..... 357

16. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—CHOICE OF WAYS. An oiler, on his way to oil machinery, is not guilty of contributory negligence and does not assume the risk, as a matter of law, in choosing a passageway between a carriage and skids, which was usually taken by employees, when he might have gone another way, where each way was in some degree hazardous, and no passageway had been specially provided by the employer. *Smith v. Hewitt-Lea Lumber Co*..... 357

17. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISK—CHOICE OF WAYS. The rule that there can be no recovery by a servant who chose a dangerous way, when there was a safe one open to him, assumes that he had knowledge of the danger, and does not apply where there were two ways of ascending a turret in a battleship, both free from danger when the hoists were not in operation, and he, without warning, accidentally chose one, not knowing that it was in operation. *Well v. Moran Bros. Co*..... 102

18. SAME—EVIDENCE—QUESTION FOR JURY. In such a case, where the plaintiff testified that he did not know the hoist was in operation,

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and that when operated it made such noise that any one could hear it, and he neither saw nor heard it, the question whether it was in operation when he started is for the jury. *Well v. Moran Bros. Co.* 102

19. SAME—CONTRIBUTORY NEGLIGENCE—ASSUMPTION OF RISKS—SAFE PLACE. A coal miner is not guilty of contributory negligence and does not assume the risk of the unsafety of the place in which he works, where injury resulted from a condition at another place, and could have been discovered only by an examination which it was not his duty to make. *McKenzie v. North Coast Colliery Co.*..... 495

20. MASTER AND SERVANT—ASSUMPTION OF RISKS—SAFE PLACE. Coal miners, who are paid extra for work in putting in props to protect the safety of the place, do not assume the risk of insufficient props where the work was done under the direction and control of a pit boss whose duty it was to supervise and inspect the work. *McKenzie v. North Coast Colliery Co*..... 495

21. MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGERS—KNOWLEDGE OF CONSEQUENCE. A lineman of ordinary intelligence and six years' experience, who had previously worked in iron or steel mills, assumes the risk from sawing iron lugs from insulators supporting a trolley wire, whereby iron dust was thrown into his eye, that being a common happening during six days' work in sawing lugs; and, with knowledge of such danger, he cannot plead ignorance of the fact that the consequence might be the loss of his eye. *Nordstrom v. Spokane & Inland Empire R. Co*..... 521

22. SAME—SAFE PLACE—ANTICIPATION OF DANGER—ASSUMPTION OF RISKS. Where a lineman, sawing iron lugs from insulators supporting a trolley wire, was injured by iron dust thrown into his eye, the master is not liable for failing to supply a safe place in which to work in that the tower car was not high enough to bring the lineman's eyes above the lugs and out of danger from flying iron dust, where it appears that, owing to the unevenness of the track, the lineman on the tower would sometimes be above and sometimes below the lugs, and the plaintiff worked six days and made no complaint, although dust in the eyes was a common occurrence and the danger was as well known to the servant as to the master; since, in such a case, the servant assumes the risks of obvious dangers respecting the safety of the place, and the master is not liable if the danger is so unlikely to happen that it would not be anticipated by the ordinarily prudent man, whether master or servant. *Nordstrom v. Spokane & Inland Empire R. Co*..... 521

23. SAME—ASSUMPTION OF RISKS. Assumption of risks is not a defense to an action for personal injuries sustained by reason of the master's failure to guard a saw as required by the factory act. *Benner v. Wallace Lumber & Mfg. Co*..... 679

MAY AND SHALL:

Construction of in statute, see STATUTES, 6.

MECHANICS' LIENS:

Parties not interested in appeal, see APPEAL AND ERROR, 8.
Liens for repair of vessels, see MARITIME LIENS.
Liens on fund due contractor for labor and materials for public improvements, see MUNICIPAL CORPORATIONS, 18, 19.

1. MECHANICS' LIENS—FORECLOSURE—JURISDICTION—FAILURE TO PROVE LIEN. In an action in equity to foreclose a mechanics' lien the court does not lose jurisdiction by plaintiff's abandonment of the lien at the trial, as defendant may have a jury trial on the issue of debt. *Pacific Iron & Steel Works v. Goerig*..... 149

2. SAME—PERSONAL JUDGMENT. A personal judgment may be rendered in an action to foreclose a mechanics' lien upon proper evidence, whether the lien is established or not. *Pacific Iron & Steel Works v. Goerig*..... 149

3. MECHANICS' LIENS—PARTIES PLAINTIFF—CAPACITY TO SUE—OBJECTIONS—WAIVER. It cannot be objected that a corporation has no capacity to sue in an action to foreclose a mechanics' lien for work and labor in repairing a machine, under Laws 1905, p. 137, where the claim for a lien was abandoned and not an issue at the trial. *Pacific Iron & Steel Works v. Goerig*..... 149

MILK:

Adulteration, evidence of, see ADULTERATION.

MINES AND MINERALS:

Injury to coal miners, see MASTER AND SERVANT, 1, 8, 9, 14, 19, 20, 22.
Lease of mineral lands, see PUBLIC LANDS.
Oral grub-stake agreement, see TRUSTS, 3.

1. MINES AND MINERALS—CLAIMS—ASSESSMENT WORK—ROAD BUILDING—STATUTES. Laws 1899, p. 73, § 14, providing that road work may apply on assessment work on mining claims, when authorized by a public meeting of at least twelve property holders called by the mining recorder, applies only to organized mining districts. *Sexton v. Washington Mining & Milling Co*..... 380

2. SAME—ROADS OUTSIDE CLAIM—UNORGANIZED DISTRICTS. The building and construction of roads intended to be used in the general development of mining property in an unorganized mining district, although done outside the boundaries of a claim, is the doing of assessment work on the claim, within the meaning of the mining law. *Sexton v. Washington Mining & Milling Co*..... 380

MISAPPROPRIATION:

Of advancements, see LIENS.

MISTAKE:

Ground for opening or vacating judgment, see JUDGMENT, 8.
Of law, in listing property, see TAXATION, 2.

MITIGATION:

See LIBEL AND SLANDER, 11.

MODIFICATION:

Of judgment by appellate court, see APPEAL AND ERROR, 38, 39.

MONEY:

Obtaining money under false pretenses, see FALSE PRETENSES.

MONEY LENT:

1. MONEY LENT—LIABILITY—FINDINGS—SUFFICIENCY. Findings support a judgment for plaintiff for $3,000 money loaned, where it appears that defendant received the same from plaintiff under an agreement to tender the same upon an option to purchase certain steamboats, and if the tender was accepted, to transfer certain stock to the plaintiff, but if not accepted, to return the money, and that the tender was not accepted, and plaintiff failed to return the money. *Cornthwaite v. Barrington Transportation Co*..... 389

MONEY RECEIVED:

1. MONEY RECEIVED—PLEADING AND PROOF—VARIANCE. Where an agent, occupying an office jointly with defendant, effected a sale and left the state, and defendant found among the agent's papers a certificate of deposit endorsed in blank, in an envelope showing that it was part of the earnest money paid to the agent, the fact that defendant deposited the certificate in bank to his own account, and held it subject to the agent's order, would not render defendant liable to the vendee on a complaint alleging that defendant had made the sale and received the earnest money, defendant having had no connection with the transaction and no business connection with the agent. *Jones v. Jones*..... 531

MORTGAGES:

Of wife's separate property, see HUSBAND AND WIFE, 3.
As notice affecting *bona fides* of purchaser of land, see VENDOR AND PURCHASER, 3.
Payment by mortgagee to protect his lien rights, see VENDOR AND PURCHASER, 4, 5.

1. MORTGAGES—PROPERTY SUBJECT—MORTGAGE BY PURCHASER IN POSSESSION—EFFECT. The interest of a purchaser in possession is subject to mortgage, and a mortgage operates as an equitable assignment of the interest, which precludes a rescission without giving the mortgagee opportunity to perform. *Scott v. Farnam*..... 336

MOTIONS:

Heard in another county, see COURTS, 3.
Judgment on motion as a bar, see JUDGMENT, 10, 12.
Notice of, see JUDGMENT, 2.
Waiver of objection to hearing, see TRIAL, 1.

MUNICIPAL CORPORATIONS:

Review of findings on assessments, see APPEAL AND ERROR, 30.
Delegation of legislative powers to municipal corporations, see CONSTITUTIONAL LAW, 1, 2.
Inadequate and excessive damages, see DAMAGES, 14.
Appropriation of land for highways, see EMINENT DOMAIN.
Right of abutting owner to compensation for taking of easement in street, see EMINENT DOMAIN, 2, 3.
Discharge of surety on contractor's bond by change in work, see PRINCIPAL AND SURETY.
Grant of franchise to street railways, sale at auction, see STREET RAILROADS, 1.
Collision of street cars with persons or vehicles on track, see STREET RAILROADS.
Water supply, see WATERS AND WATER COURSES, 6-10.

1. MUNICIPAL CORPORATIONS — ORDINANCE — ADOPTION — INTEREST OF COUNCILMEN. An ordinance vacating a street is invalid where a councilman who cast the deciding vote for its passage was one of the petitioners, and would profit by its enactment. *Smith v. Centralia* 573

2. SAME—TITLE—DUPLICITY. An ordinance entitled an ordinance providing for the laying out, extending, etc., of certain streets as highways, boulevards and parkways, and for the condemnation of land therefor, is not void in that it embraces more than one subject, viz., condemnation (1) for streets and (2) for parkways; since it all relates to one general subject—the condemnation of land for a public use. *Seattle v. Sylvester-Cowen Investment Co*..... 659

3. SAME—ORDINANCE—VALIDITY—TITLE—LEGALITY OF OBJECT—CONSTRUCTION. An ordinance entitled an ordinance to provide for laying out and establishing streets and "parkways" and levying assessments against the property benefited, the city to bear the expense not levied against property benefited, is not void by reason of including parkways for which no assessment could be made on private property, where private property was not sought to be assessed for the parkways, which were procured thereunder by private treaty at the expense of the city. *Seattle v. Sylvester-Cowen Investment Co*... 659

4. MUNICIPAL CORPORATIONS—CONTRACTS—OFFICER INTERESTED—EFFECT—SPECIAL ASSESSMENTS—DEFENSES. The purchase of supplies by a contractor for city work, from the mayor, only avoids his contract with the city *pro tanto*, under Bal. Code, § 968, providing that any claim for supplies furnished, "in which any such officer is in-

MUNICIPAL CORPORATIONS—CONTINUED.

terested," shall be void and that the officer shall forfeit his office; and does not bar an action by the contractor as holder of a warrant against a special fund to compel a reassessment to provide the fund. *Shaw & Hodgins v. Waldron*..... 271

5. MUNICIPAL CORPORATIONS—IMPROVEMENTS—POWER TO CONTRACT—DELEGATION TO COMMITTEE. Where a town council determines upon the construction of a sidewalk and the character of the improvement, it may delegate the letting of the contract to a committee. *Woldenberg v. Sampson*..... 152

6. SAME—PAYMENT—ESTABLISHMENT OF SINKING FUND—INVALIDITY—EFFECT. Where a town council legally authorized an improvement, the want of power to establish a special sinking fund for its payment, as directed by the resolution, is not ground for an injunction forbidding the city to pay the cost of the improvement. *Woldenberg v. Sampson* 152

7. MUNICIPAL CORPORATIONS—ASSESSMENTS—REASONABLENESS. The amount of previous assessment is immaterial on the question of the reasonableness of an assessment. *In re Third, Fourth and Fifth Avenues, Seattle* 519

8. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS—REDUCTION—PROPERTY AFFECTED—STATUTES—CONSTRUCTION. Under Laws 1907, p. 316, § 28, providing that on confirmation of an assessment of property for local improvements, default "may" be entered as to the property of noncontesting owners, "may" should not be construed to mean "must," in view of other provisions of the statute authorizing the court to apportion part of the cost of the improvement to the city, and to change any assessment or recast the same according to the "principles" of the act, which appear to require each parcel of land to "bear its relative equitable proportion" of the costs. *Seattle v. Sylvester-Cowen Investment Co*..... 659

9. SAME—REASSESSMENTS—INTEREST. Upon a reassessment, interest on the amount of the condemnation awards is properly added. *In re Third, Fourth and Fifth Avenues, Seattle*..... 519

10. SAME—PRESUMPTIONS. Where the record does not show the exact date when an assessment became delinquent, it will be presumed that an action to compel a reassessment was commenced within the period limited by the statute of limitations, when the defense of the statute was not interposed and a reassessment was ordered. *Shaw & Hodgins v. Waldron*..... 271

11. SAME—EXCESSIVE ASSESSMENTS—APPEAL—REVIEW. An assessment ordered by the court against property benefited by a local improvement will not be reduced as excessive unless the evidence so clearly preponderates against the finding as to indicate arbitrary action. *Seattle v. Sylvester-Cowen Investment Co*..... 659

MUNICIPAL CORPORATIONS—CONTINUED.

12. MUNICIPAL CORPORATIONS—IMPROVEMENTS—ASSESSMENTS — ACTION TO ENJOIN—COMPLAINT—DEFINITENESS. In an action by owners of property abutting on a street, to enjoin an assessment thereof for street improvements, attacking the proceedings as a whole and not any particular lien on specific property, the allegation as to plaintiff's property need only be sufficiently definite to show their interest, and it is not error to refuse to require the complaint to set out a specific description. *Coats Shingle Co. v. Hoquiam*..... 690

13. SAME—COMPLAINT—SUFFICIENCY—OPPORTUNITY TO BE HEARD. A complaint to enjoin an assessment for a street improvement in a city of the second class states a cause of action where it is alleged that the city is proceeding to make the assessment without giving the plaintiff property owners notice or opportunity for a hearing upon the equalization of the assessments, as required by Laws 1907, p. 623, § 40, and that the city has included large sums not a part of the cost of the improvement and not properly chargeable to the property benefited, without an opportunity to be heard. *Coats Shingle Co. v. Hoquiam*..... 690

14. IMPROVEMENTS—ASSESSMENTS—REMEDY BY APPEAL—INJUNCTION. Where a city council had jurisdiction to approve or reject a petition for a replat, and to assess damages or benefits, the remedy for illegal assessments upon a void order modifying the replat is by the appeal provided by the city charter, and not by injunction. *Brazell v. Seattle* 180

15. MUNICIPAL CORPORATIONS—ASSESSMENTS—SPECIAL FUNDS—WRONGFUL DIVERSION—PREJUDICE. A wrongful diversion of a special street fund, to the prejudice of the plaintiff, is not shown where it appears that, if none of the wrongful acts complained of had been committed by the city authorities, the special fund would have been exhausted by the payment of warrants in their order prior to the warrant held by the plaintiff. *Ames v. Seattle*..... 222

16. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—REASSESSMENTS —LIMITATION OF ACTIONS. An action by a holder of a warrant against a special improvement fund to compel a reassessment cannot be maintained when the landowner could plead the statute of limitations against the reassessment. *Shaw & Hodgins v. Waldron*... 271

16½. SAME — SUSPENSION OF STATUTE — JUDGMENTS — RES JUDICATA—PARTIES BOUND. An action begun by a holder of a warrant against a special fund to compel a reassessment, he having no other remedy, in which the city defends for the benefit of the landowners, arrests the running of the statute of limitations against the right to levy a reassessment, and is equivalent in law to a valid assessment, and is binding on the landowners. *Shaw & Hodgins v. Waldron*..... 271

17. SAME—DEFENSES—SPECIAL FUND. The liability of a city for failure to take a bond to protect materialmen on public work is not

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affected by the fact that the work was to be paid for by special assessments on the property benefited. *Fransioli v. Thompson*..... 259

18. MUNICIPAL CORPORATIONS—IMPROVEMENTS—LIABILITY FOR MATERIAL—FAILURE TO REQUIRE BOND—CHANGE OF PLANS. Under Bal. Code, §§ 5925-5927, making a city liable for the cost of material furnished to a contractor on city work, if the city fails to require the contractor to enter into a bond to secure the same, the city is liable for materials furnished for additional work, where, after letting a contract and taking the bond, the city ordered such radical changes in the work as to release the sureties on the bond taken, and failed to require a new bond to cover the additional liability created by the change in plans. *Fransioli v. Thompson*..... 259

19. SAME—DEFENSE—ESTOPPEL—ACCEPTANCE OF WORK. In such a case, the city is estopped to assert that the change was not authorized, where it accepted and paid for the work. *Fransioli v. Thompson* 259

20. MUNICIPAL CORPORATIONS—HEALTH REGULATIONS—ORDINANCES. An ordinance making it unlawful for any one outside the crematory department to haul refuse through the streets is not restricted by Bal. Code, § 3000, requiring owners of private property to remove the source of filth upon twenty-four hour's notice, the latter affording merely a cumulative remedy. *Smith v. Spokane*..... 219

21. MUNICIPAL CORPORATIONS — HEALTH REGULATIONS — OBJECTIONS—PERSONS ENTITLED. An ordinance creating a crematory department for the collection of garbage cannot be objected to by a stranger as delegating to a board the power to fix a schedule of prices, when the prices fixed were satisfactory to the parties concerned. *Smith v. Spokane* 219

22. MUNICIPAL CORPORATIONS—STREETS—VACATION—HEARING—CONTINUANCE. A city council having obtained jurisdiction, by petition and notice, to vacate a street, jurisdiction is not lost by postponing the hearing without entering a continuance to a day certain or giving notice of the time. *Brazell v. Seattle*..... 180

23. SAME—POWER TO VACATE—PROCEDURE. City councils have no power to vacate streets except as delegated by the legislature, and the procedure therefor must be strictly followed. *Brazell v. Seattle*. 180

24. SAME—REPLATS—POWER TO MODIFY — STATUTES — CONSTRUCTION. Under Laws 1903, p. 139, authorizing street vacations and replats, upon the filing of a replat, "accompanied with a petition for the change desired" by three-fourths of the owners, which the council may approve or reject, and "assess damages or benefits, award the same and make such order in the premises as justice and the public welfare may require," the council has no power to modify the proposed replat, but must approve or reject it in its entirety, and an

MUNICIPAL CORPORATIONS—CONTINUED.

order approving part of the vacation petitioned for is void. *Brazell v. Seattle* 180

25. SAME—REPLATS—POWER TO MODIFY—STATUTES. Laws 1903, p. 139, requiring a proposed replat for street vacations to be filed showing the changes petitioned for by three-fourths of the owners, and giving the city council complete jurisdiction to inquire into and determine the merits, assess damages or benefits, award the same, and make orders required by justice and the public welfare, the city council can only approve or reject the petition in its entirety, and an order altering the proposed replat is void; the orders required by justice, etc., referring to the necessary assessments and awards, and not to modifications of the replat. *Brazell v. Seattle*..... 180

26. MUNICIPAL CORPORATIONS—STREETS—VACATION—ABUTTING OWNERS —RIGHTS. An abutting property owner on a street has an interest different in kind from that of the public, where the street is vacated so as to close or affect his access, and may maintain an action to set aside an illegal vacation. *Smith v. Centralia*..... 573

27. SAME—POWER OF COURTS—INVALID ORDINANCES. The courts have power to set aside a vacation of a street, although the same is a legislative function, where the law or ordinance is invalid and an attempt to enforce it is made or threatened. *Smith v. Centralia* 573

28. SAME—STATUTORY PROCEEDINGS—VALIDITY OF VACATION. The vacation of a street pursuant to Laws 1901, p. 175, is invalid, where the petition was not signed by the owners of more than two-thirds of the private property abutting upon that part of the street, the notice was not given, and the ordinance vacated part of the street not described. *Smith v. Centralia*..... 573

29. MUNICIPAL CORPORATIONS — INCORPORATION — EFFECT — CONTROL OF STREETS—PRIOR FRANCHISES. A town upon its incorporation does not acquire any such vested right to the control of its streets in virtue of its authority over streets, granted by Bal. Code, § 1011, as would prevent the legislature from legalizing prior franchises. *Spring Water Co. v. Monroe*..... 195

30. MUNICIPAL CORPORATIONS—FRANCHISES—LEGISLATIVE AUTHORITY—CONTROL BY COURTS. The power conferred upon the legislative authority of municipal corporations to grant franchises for the use of the streets is purely legislative and cannot be controlled by the courts. *Ewing v. Seattle*..... 229

31. MUNICIPAL CORPORATIONS — NEGLIGENCE — DEFECTIVE SIDEWALKS—PROXIMATE CAUSE. Where plaintiff's companion was struck by a bicyclist, causing plaintiff to fall and step into a hole in the sidewalk due to a missing plank, breaking her ankle, the missing plank is the efficient cause of the injury. *Keane v. Seattle*..... 622

MUNICIPAL CORPORATIONS—CONTINUED.

32. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE—AUTOMOBILES—PLEADING—PROXIMATE CAUSE. A complaint alleging that a team was frightened by the negligence of the driver of an automobile in blowing his whistle when directly opposite the team, while driving at a high rate of speed in violation of a city ordinance, in such a manner as to frighten the team, fairly includes the rate of excessive speed as a proximate cause of the accident. *Grant v. Armstrong* 365

33. SAME—USE OF STREETS—AUTOMOBILES—NEGLIGENT DRIVING—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in the driving of an automobile, whereby a team was frightened and ran away, to require the case to be submitted to the jury, where it appears that the automobile was run at a speed of twenty or twenty-five miles an hour, on a street where there were many teams and where the city ordinances prohibited a speed in excess of ten miles an hour, that the driver passed within fifteen feet of the team, and blew his whistle when directly opposite, and did not notice the horses before they started to run. *Grant v. Armstrong*..... 365

34. MUNICIPAL CORPORATIONS—STREETS—COLLISION WITH AUTOMOBILE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—SUFFICIENCY. In an action for injuries to plaintiff's horse and buggy in a collision with defendant's automobile, where the evidence is conflicting as to whether plaintiff was guilty of contributory negligence in driving on the left side of the street near a turn, findings for the plaintiff are supported by evidence that the automobile struck the left side of the buggy and horse before it had turned straight with the street. *Schoening v. Young* 90

35. MUNICIPAL CORPORATIONS—POWERS—OFFICERS—LIABILITY OF CITY FOR MISFEASANCE—IMPROVEMENTS—FUNDS. In the matter of local improvement contracts, a city exercises proprietary or private functions as distinguished from governmental or public functions; and for this reason must answer for misfeasance of its officers and is responsible for money paid to the city comptroller under a long established practice or custom, and appropriated by that officer, although the charter provides for the payment of moneys into the city treasury; the moneys received for such improvements not being "moneys of the city" within the charter meaning of the term, especially where the indebtedness created for such improvements is a charge against the property and not a debt of the city. *Seattle v. Stirrat* 560

36. MUNICIPAL CORPORATIONS—ANNEXATION—PUBLIC DEBT—WARRANTS—PAYMENT—FUNDING BONDS. Where an ordinance for the annexation of an adjoining city provided that no property within either former city shall ever be taxed for any portion of any prior indebtedness of the other, and after annexation, the city passed an ordinance making an appropriation out of its general fund "for the purpose

MUNICIPAL CORPORATIONS—CONTINUED.

of retiring certain outstanding warrants" of the annexed territory, and it appears from the ordinance that it was not the intention to extinguish the indebtedness or retire the warrants so as to relieve the property, but to refund them by a bond issue, the actual payment of the warrants of the annexed city with such funds did not extinguish the indebtedness as a charge against the property in the annexed city; and the issuance of funding bonds chargeable on such property was authorized. *Fisher v. Seattle*..... 396

37. SAME—LIMIT OF AMOUNT—PORTION VALID—FUNDING. Where a city is indebted in excess of its constitutional limit, the excess only requires ratification; and funding bonds for a portion of the debt are valid without ratification, if the portion funded was within the constitutional limit. *Fisher v. Seattle*..... 396

38. SAME—LOAN OF CREDIT—FUNDING BONDS—ANNEXED TERRITORY. The constitutional prohibition against a city's loaning its credit to another corporation does not apply to the loan of funds to facilitate a bond issue for the payment of the indebtedness of annexed territory. *Fisher v. Seattle*..... 396

NEGLIGENCE:

Of carriers in carriage of live stock, see CARRIERS.

Inadequate and excessive damages, see DAMAGES, 7-15.

Acts and statements accompanying or connected with transaction as constituting part of *res gestae*, see EVIDENCE, 2.

Demised premises, see LANDLORD AND TENANT, 10.

Of employers, see MASTER AND SERVANT.

Risks assumed by servant, see MASTER AND SERVANT, 16-23.

Contributory negligence of servant, see MASTER AND SERVANT, 11, 15-19.

Accidents on city streets or sidewalks, see MUNICIPAL CORPORATIONS, 31-34.

Liability of surgeon for negligence, see PHYSICIANS AND SURGEONS, 2, 3.

Of person injured at railroad crossing, see RAILROADS.

Injuries by collision with street cars, see STREET RAILROADS, 1.

Of person injured by street car, see STREET RAILROADS, 2-6.

1. NEGLIGENCE—EVIDENCE—ADMISSIBILITY—FRIGHT OF HORSE. Where an old, gentle horse suddenly became frightened 100 or 150 feet from a platform, on which were milk cans and a quarter of fresh beef, and there was no direct evidence and nothing more than a bare probability as to the cause of his fright, it is inadmissible to prove that other horses driven past the platform at another time had become frightened, and that there was fresh beef piled thereon at the time, either as inference as to the cause of the accident or to show notice. *Wilkie v. Chehalis County Logging and Timber Co*..... 324

NEGLIGENCE—CONTINUED.

2. NEGLIGENCE—EVIDENCE—SUFFICIENCY—FRIGHT OF HORSE—PROXIMATE CAUSE. In such a case, the mere probability that the horse became frightened at the quarter of beef, is not an evidentiary fact that will sustain a judgment for damages, regardless of whether the platform as maintained was a nuisance; since it was not shown that the same was the proximate cause of the accident. *Wilkie v. Chehalis County Logging and Timber Co*..... 324

3. NEGLIGENCE—DRIVER OF TEAM—EVIDENCE—SUFFICIENCY. The evidence is insufficient to warrant a finding that the proximate cause of plaintiff's injuries was the negligence of the driver of a team that took fright at an automobile, where all of plaintiff's disinterested witnesses testified that he was holding his horses tightly and doing all he could to keep them under control, although one interested witness testified that he was driving with loose lines. *Grant v. Armstrong* 365

NEGOTIABLE INSTRUMENTS:

See BILLS AND NOTES.

NEWLY DISCOVERED EVIDENCE:

See NEW TRIAL.

NEWSPAPERS:

Libel, see LIBEL AND SLANDER.

NEW TRIAL:

Effect of motion for new trial on time to appeal, see APPEAL AND ERROR, 10.

Review of rulings on motion as involving discretion of court, see APPEAL AND ERROR, 24.

Review of grant, see APPEAL AND ERROR, 26.

Remand by appellate court for new trial, see APPEAL AND ERROR, 39.

Scope of, after remand by appellate court, see APPEAL AND ERROR, 37.

Correction in same court, see COURTS, 2, 3.

1. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE. A new trial for newly discovered evidence is properly overruled where it appears that the evidence was known but not produced because its necessity was not anticipated. *Schoening v. Young*..... 90

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE—CUMULATIVE. A new trial should not be granted for newly discovered evidence consisting of a letter that could not be found, where its loss and contents were proven at the trial, as the evidence would be only cumulative. *Galena National Bank v. Ripley*..... 615

NOMINATIONS:

For office, see ELECTIONS.

NONSUIT:

Before trial, see DISMISSAL AND NONSUIT.

NOTES:

Promissory notes, see BILLS AND NOTES.

NOTICE:

Defenses to bill or note, see BILLS AND NOTES, 1.
Judicial notice, see EVIDENCE, 1.
Of motion for judgment, see JUDGMENT, 2.
To master of defects in appliances, see MASTER AND SERVANT, 3, 4.
Defects or danger as element of assumption of risk by servant, see MASTER AND SERVANT, 16-23.
Proceedings for public improvements, see MUNICIPAL CORPORATIONS, 12, 13.

OBJECTIONS:

Review as dependent on objection or exception made on trial, see APPEAL AND ERROR, 4-6.
To pleadings and waiver thereof, see PLEADING, 2, 5.
At trial, see TRIAL, 1, 2.

OCCUPATION:

Denial of liberty to choose occupation, see CONSTITUTIONAL LAW, 1, 3, 4.

OFFICERS:

Corporate officers, see CORPORATIONS, 2, 4.
Imputation of, misconduct in office as libel, see LIBEL AND SLANDER, 1, 2, 9-11.
Municipal officers, see MUNICIPAL CORPORATIONS, 4.
Liability of municipality for torts of officers, see MUNICIPAL CORPORATIONS, 35.

OPINIONS:

In civil actions, see EVIDENCE, 3-6.

OPTION:

To purchase, forfeiture by expiration of lease, see LANDLORD AND TENANT, 1, 2.

ORAL CONTRACTS:

See FRAUDS, STATUTE OF.

ORAL TRUSTS:

See TRUSTS, 3.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1-3.

PARENT AND CHILD:

Gifts between parent and child, see TRUSTS, 1, 2.

PAROL AGREEMENTS:

Effect and requirements of statute of frauds, see FRAUDS, STATUTE OF.

PARTIES:

Joinder of actions against different parties, see ACTION, 2.
On appeal or writ of error, see APPEAL AND ERROR, 8.
Entitled to allege error, see APPEAL AND ERROR, 19-21.
Concluded by judgment, see APPEAL AND ERROR, 38; JUDGMENT, 11, 12.
Violation of order by one not a party as contempt, see CONTEMPT, 4.
Entitled to appeal, see EMINENT DOMAIN, 16.
For compensation for property taken for public use, see EMINENT DOMAIN, 17.
Capacity to sue, waiver of objection, see MECHANICS' LIENS, 3.

1. PARTIES—NEW PARTIES. The right of the court to order necessary parties to be brought in is inherent, and is conferred by Bal. Code, § 4840. *In re Clerf* 465

PARTITION:

Appointment of agent to represent absentees, see ABSENTEES.

PARTNERSHIP:

1. PARTNERSHIP—ACTIONS BETWEEN PARTNERS — SETTLEMENT. Partners cannot recover from a copartner money received by him until after a full settlement of the partnership business. *Kwapil v. Bell Tower Co.* 583

PAYMENT:

Burden of proof, see INDEMNITY, 2.
City warrants, see MUNICIPAL CORPORATIONS, 36.

PEDDLERS:

See HAWKERS AND PEDDLERS.
Validity of laws requiring license, see CONSTITUTIONAL LAW, 3-5.

PENALTIES:

Under contracts, see DAMAGES, 1.

PENDENCY:

As ground for abatement, see ABATEMENT AND REVIVAL.
Pendency of appeal, as affecting limitation of action, see LIMITATION OF ACTIONS.

PERJURY:

Pendency of charge against impeached witness, see WITNESSES, 3.

1. PERJURY — INDICTMENT — SUFFICIENCY. Under Bal. Code, § 7185, making it perjury for any one to wilfully, and contrary to his oath taken in cause, state as true material matter which he knows to be false, and Id., § 7191, providing that "an unqualified statement of that which one does not know to be true is equivalent to a statement of that which one knows to be false," the common law and statutory crimes are substantially the same, and an information good at common law is good under the statute. *State v. Eaid*.. 302

2. SAME. An information charging perjury is sufficient where it clearly sets forth in ordinary language, without repetition, the substance of the controversy in which the oath was taken, the taking of the oath, the authority of the court, and proper allegations as to the falsity of the matter. *State v. Eaid*..... 302

3. SAME — DUPLICITY — CRIMINAL LAW — TRIAL—ELECTION BETWEEN COUNTS. An information for perjury may embrace in a single count all the particulars in which the defendant is alleged to have sworn falsely, and it is not error to refuse to require the prosecution to make an election, upon a charge that the accused testified falsely that he did not know of the prior execution of a contract and did not know that Y. was the owner of certain property. *State v. Eaid* 302

PERSONAL INJURIES:

See NEGLIGENCE.
Inadequate and excessive damages, see DAMAGES, 7-14.
Expert testimony as to cause of injury to person, see EVIDENCE, 4.
To employee, see MASTER AND SERVANT.
Collision with automobile, see MUNICIPAL CORPORATIONS, 32-34.
To traveler on highway crossing railroad, see RAILROADS.
Release of claim for damages, see RELEASE.
To persons on or near street railroad tracks, see STREET RAILROADS.

PERSONAL JUDGMENT:

On foreclosure of mechanic's lien, see MECHANICS' LIENS, 2.

PERSONAL PROPERTY:

Measure of damages for injuries to personal property, see DAMAGES, 4.
Oral sale of personalty, see FRAUDS, STATUTE OF.

PHYSICIANS AND SURGEONS:

Malpractice, harmless error as to measure of damages, see APPEAL AND ERROR, 35.
Practicing without a license, repeal of statute, see CRIMINAL LAW, 2, 3.

PHYSICIANS AND SURGEONS—CONTINUED.

Measure of damages for malpractice, see DAMAGES, 3.
Excessive verdict for malpractice, see DAMAGES, 5.

1. PHYSICIANS AND SURGEONS—PRACTICING WITHOUT LICENSE—EVIDENCE—TWO OFFENSES. A conviction for practicing medicine without a license cannot be objected to in that there were two forms of offense proven, where there was no attempt to charge more than one crime, and the testimony as to the several *indicia* of practicing was merely evidentiary; especially where the only objection to such evidence was that it was immaterial and the accused admitted that he had no license. *State v. Hanover* 403

2. MALPRACTICE—NEGLIGENCE—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence to make a case for the jury, in an action for malpractice, in the use of infected and unsterilized instruments from which a disease might have been contracted, where the defendant denied plaintiff's statement that he took the instruments from a drawer without cleansing them or that he ever did so or kept them there, and two other witnesses testified that on similar examinations made by him he took the same instruments from the same place and used them in the same way that plaintiff described. *Helland v. Bridenstine* 470

3. SAME. There is sufficient evidence to sustain a verdict for malpractice in the use of infected and unsterilized instruments from which a disease might have been contracted, where there was evidence tending to show the negligent use of instruments, without cleansing, that prior thereto plaintiff was free from the disease and could have contracted it in no other way, and became affected within the usual time thereafter for the disease to germinate; as it was only necessary to show a chain of circumstances from which the ultimate fact might reasonably be inferred. *Helland v. Bridenstine* 470

PLACE:

Criminal jurisdiction as dependent on locality of offense, see CRIMINAL LAW, 4.

PLEADING:

Complaint for damages, sufficiency, see ACTION, 1.
Joinder of causes of action, see ACTION, 2.
Presumption as to amendment, see APPEAL AND ERROR, 22.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 31.
On insurance policies, see INSURANCE, 9.
Waiver of limitations by failing to plead, see INDEMNITY, 1.
Actions for libel, see LIBEL AND SLANDER, 5, 12, 13.
In action by servant for personal injuries, see MASTER AND SERVANT, 4.

PLEADING—CONTINUED.

To enforce mechanic's lien, see MECHANICS' LIENS.
In action for money received, see MONEY RECEIVED.
In actions relating to municipal improvements, see MUNICIPAL CORPORATIONS, 12, 13.
Actions for negligence, see NEGLIGENCE.
For price of goods sold, see SALES, 4-6.
Judgment on the pleadings, see SALES, 6.
As evidence, see TRIAL, 7.
Applicability of instructions to pleadings, see TRIAL, 11.

1. PLEADINGS—SEPARATE COUNTS—REPETITION. It is inconsistent with the spirit of the code to permit a person who has but one cause of action to allege, as distinct causes, one upon contract and another upon *quantum meruit*, as permitted at common law to avoid a variance; but he must state one cause in concise language without repetition. *Gabrielson v. Hague Box & Lumber Co*..... 342

2. PLEADINGS—DEMURRER—DEFECTS CURED BY EVIDENCE. The objection that a petition does not state sufficient facts to support the findings, cannot be urged where no demurrer was interposed to the petition or objection made prior to the trial, and the evidence admitted cured any defect in the pleading. *Wheatman v. Kane*... 226

3. PLEADING—DEMURRER. A general demurrer in an action against two defendants, only one of whom is liable, should be overruled as to one and sustained as to the other. *Humphries v. Cooper*... 376

4. PLEADING—VARIANCE—FAILURE OF PROOF—AMENDMENTS. A verdict for plaintiff, in an action for the conversion of horses shipped by defendant's road, cannot be sustained upon evidence of a breach of defendant's contract of carriage, as against a motion for nonsuit or judgment *non obstante veredicto;* as amendments to conform to proof do not permit allegation of one cause and proof of an entirely different cause. *Spokane Grain Co. v. Great Northern Express Co.* 545

5. PLEADING—AMENDMENT TO CONFORM TO PROOF. It is not error to allow the complaint to be amended to conform to proof increasing the damage claimed for injury to a horse, where there was no motion to strike the evidence or claim of surprise or demand for time to meet the amendment. *Wilson v. Seattle, Renton & Southern R. Co.* 656

POLICE POWER:

Of state, see CONSTITUTIONAL LAW.

POLICY:

Of insurance, see INSURANCE.

POSSESSION:

See ADVERSE POSSESSION.

PRACTICE:

See ABATEMENT AND REVIVAL; APPEAL AND ERROR; CONTEMPT; CRIMINAL LAW; DISMISSAL AND NONSUIT; JUDGMENT; LIMITATION OF ACTIONS; NEW TRIAL; PLEADING; RECEIVERS; TRIAL; VENUE.
Procedure of particular courts, see COURTS.
Condemnation proceedings, see EMINENT DOMAIN.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 31-36.

PRESCRIPTION:

See WATERS AND WATER COURSES, 1-4.
Establishment of highways, see HIGHWAYS.

PRESUMPTIONS:

On appeal, see APPEAL AND ERROR, 22.
On collateral attack, see JUDGMENT, 4-7.
From recitals in judgment, see JUDGMENT, 5-7.
As to negligence, see RAILROADS, 1.

PRINCIPAL AND AGENT:

See BROKERS.
Appointment of agent on sale of estate of absentees, see ABSENTEES.
Authority to waive stipulations in policy, see INSURANCE, 1-5.
Ratification of officer's act by city, liability for tort, see MUNICIPAL CORPORATIONS, 35.

1. PRINCIPAL AND AGENT—CONTRACTS—LIABILITY OF AGENT TO THIRD PERSON. Whether agents are personally bound by their contract to sell and guarantee any article depends upon the mutual intent of the parties. *Gordon v. Brinton*..... 568

2. SAME—EVIDENCE—SUFFICIENCY. Sellers of an electric motor, who were agents of a motor company, are personally bound upon their contract, and cannot set up agency as a defense, where they signed as principals, there was nothing to disclose that they contracted as agents, or that the company was interested in or had authorized the contract, and the parties acted upon the special warranty which called for the seller's approval of the installation; especially where they pleaded no agency, but set up a counterclaim for the balance due. *Gordon v. Brinton*..... 568

PRINCIPAL AND SURETY:

See INDEMNITY.

1. PRINCIPAL AND SURETY—BONDS FOR THE PERFORMANCE OF PUBLIC WORK—RELEASE OF SURETY—CHANGE IN CONTRACT. Where a contract for improving a city street provided for comparatively cheap cedar cribbing, a radical change by the substitution by the city authorities of an expensive concrete retaining wall, after the principal contrac-

PRINCIPAL AND SURETY—CONTINUED.

tors had sublet the work, will relieve the principal contractors and their sureties from liability on their bond to parties furnishing cement to the subcontractors for the construction of the work. *Fransioli v. Thompson*..... 259

PRIVILEGED COMMUNICATIONS:

Defamatory communications, see LIBEL AND SLANDER, 7, 8.

PROBATE:

Sale of estate of absentees, see ABSENTEES.
Of will, see WILLS.

PROCEDURE:

To vacate streets, see MUNICIPAL CORPORATIONS, 22-28.

PROCESS:

Want of process as grounds for collateral attack on judgment, see JUDGMENT, 4-7.
To sustain personal judgment, see JUDGMENT, 4-7.
In foreclosure of delinquency tax certificate, see TAXATION, 10-13.
Notice of proceedings for judgment for delinquent taxes, see TAXATION, 10-13.

PROMISSORY NOTES:

See BILLS AND NOTES.

PROPERTY:

See FRANCHISES.
Measure of damages for injuries to property, see DAMAGES, 4.
Taking for public use, see EMINENT DOMAIN.

PROVINCE OF COURT AND JURY:

In civil actions, see TRIAL, 3-5.

PROVISOS:

In statutes, see STATUTES, 5, 8.

PROXIMATE CAUSE:

Of collision with automobile, see MUNICIPAL CORPORATIONS, 32; NEGLIGENCE, 1-3.
Of injury from defects in streets, see MUNICIPAL CORPORATIONS, 31.

PUBLIC DEBT:

See MUNICIPAL CORPORATIONS, 36-38.

PUBLIC IMPROVEMENTS:

By cities, see MUNICIPAL CORPORATIONS, 3-19.

PUBLIC LANDS:

1. PUBLIC LANDS—MINES AND MINERALS—LEASES—STATUTE—CONSTRUCTION. The commissioner of public lands is not limited in the execution of leases of state mineral lands, for prospecting purposes, to the government legal subdivision of a section, by the proviso to Laws 1901, p. 313, authorizing the changing of boundaries to conform to the section lines, since the law permits a lease for "any amount not to exceed eighty acres," and should not be construed to authorize the leasing of other than mineral lands. *State ex rel. Pindall v. Ross*..... 242

2. PUBLIC LANDS—MINES AND MINERALS—LEASES—DISCRETION. Laws 1901, p. 313, providing for the leasing of state lands to the discoverer of precious minerals, leaves no discretion in the commissioner of public lands where the law has been complied with. *State ex rel. Pindall v. Ross*..... 242

PUBLIC SCHOOLS:

See SCHOOLS AND SCHOOL DISTRICTS.

PUBLIC USE:

Taking property for public use, see EMINENT DOMAIN.

PUBLIC WATER SUPPLY:

See WATERS AND WATER COURSES, 6-10.

QUANTUM MERUIT:

See ELECTION OF REMEDIES; LOGS AND LOGGING; PLEADING, 1.

QUIETING TITLE:

1. QUIETING TITLE—EJECTMENT—IMPROVEMENTS—VALUE—EVIDENCE—SUFFICIENCY. A finding that the value of improvements on real property is $400 is contrary to the evidence, where the only testimony on the subject was the affidavits of two witnesses fixing the value at $700 and $1,300, respectively. *Palmer v. Abrahams*... 352

2. QUIETING TITLE—EJECTMENT—IMPROVEMENTS—JUDGMENT—FORM. In an action to quiet title, in which the court finds the title in the defendant subject to the value of plaintiff's improvements, the judgment is bad in form where it permits the plaintiffs to remain in possession until their lien for improvements is paid; and the judgment must establish the rights of the parties in conformity with Laws 1903, p. 262. *Palmer v. Abrahams*..... 352

3. QUIETING TITLE—DECREE—FORM—EFFECT. In an action to quiet title, in which both plaintiff and defendant claim full title to lands held by defendant, a decree quieting plaintiff's title to an undivided one-half interest has the effect to confirm defendant's title to the other half. *Del Notaro v. Douglas*..... 493

RAILROADS:

Injury at crossing, harmless error in instructions, see APPEAL AND ERROR, 36.

Injuries to live stock in cars, see CARRIERS.

Exercise of power of eminent domain, see EMINENT DOMAIN, 4-6.

Railroads in city streets, see STREET RAILROADS.

Injuries to persons on or near street railway tracks, see STREET RAILROADS.

1. RAILROADS—ACCIDENT AT CROSSING—NEGLIGENCE—FAILING TO SIGNAL AT CROSSING—EVIDENCE—SUFFICIENCY. In an action for injuries sustained by one driving in a buggy and struck by a passenger train at a crossing, there is no sufficient evidence of negligence or that the bell was not rung or the whistle blown, and a verdict for defendant is properly directed, where it appears from the plaintiff's testimony that when she stopped at the crossing to look and listen, the wind was blowing such a gale in the direction of the train and raising such clouds of dust that "you could not see or hear," and the only other evidence on the subject was that of a passer-by, half a mile distant, who was paying no attention to the train, and who testified that he did not hear the whistle; negligence in failing to whistle or ring the bell not being presumed and depending on the circumstances of each case. *Holland v. Northern Pac. R. Co*..... 266

2. RAILROADS—ACCIDENT AT CROSSING—LOOK AND LISTEN—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY. The evidence does not show as a matter of law that plaintiff, injured at a railroad crossing, could have seen an approaching engine if he had looked, from the fact that photographs, taken long after the accident, and other evidence of the defendant so indicates, where there was a sharp conflict in the evidence on that point, disinterested witnesses at the time of the accident supported plaintiff's contention that obstacles cut off his view, and the jury, after a view of the premises, found for the plaintiff. *Averbuch v. Great Northern R. Co*..... 633

3. SAME—EVIDENCE—SUFFICIENCY. The plaintiff, injured while driving a delivery wagon across two railroad tracks, is not guilty of negligence in not stopping a second time to look and listen after he got onto the tracks, where it appears that he stopped as near the tracks as possible and looked and could see or hear no train, whistle, or bell, that he could see a distance of 175 to 250 feet down the track, and had but 35 or 40 feet to drive; that he was driving at about 4 miles an hour, and if the engine had not exceeded the speed limit of six miles, he could have crossed in safety, and could have heard a signal had one been given by an engine within striking distance. *Averbuch v. Great Northern R. Co*..... 633

4. SAME—TRIAL—INSTRUCTIONS. An instruction is not objectionable as stating that the pleadings admitted that obstructions obscured the view down a railroad track, where it simply stated that it was

RAILROADS—CONTINUED.

admitted that the tracks crossed a street used by the public, and that the crossing was dangerous because of its proximity to business interests. *Averbuch v. Great Northern R. Co*..... 633

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

Equitable lien for advancements, see LIENS.
Conveyance, see VENDOR AND PURCHASER.
Venue of actions to enforce a trust, see VENUE.

REASSESSMENT:

Of property for benefits from public improvements, see MUNICIPAL CORPORATIONS, 9.

REBATES:

Note given in violation of law, see BILLS AND NOTES, 2.

RECEIVERS:

Of corporations in general, see CORPORATIONS, 3.

1. RECEIVERS—COMPENSATION—LIABILITY OF PARTY FOR. The court has jurisdiction, in a proper case, to charge against the plaintiff the compensation of a receiver appointed at plaintiff's instance to take charge of property, especially where most of the property was adjudged to belong to defendants claiming the same in litigation waged by the plaintiff pending the receivership. *Lohman v. Claussen* 408

RECITALS:

Presumptions from recitals in judgment, see JUDGMENT, 5-7.

RECORDS:

Judicial notice of, see COURTS, 1; EVIDENCE, 1.
Failing to record at sale, see MARITIME LIENS, 3.

REGISTRATION:

Necessity for registration as prerequisite to voting, see ELECTIONS, 1, 2.

RELEASE:

Liability as surety, see PRINCIPAL AND SURETY.

1. RELEASE—FRAUD IN PROCURING—EVIDENCE—QUESTION FOR JURY. There is sufficient evidence of fraud in procuring a release of damages by reason of personal injuries to make a question for the jury, and it is error to grant a nonsuit, where it appears that, as an in-

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ducement to the plaintiff's signing a release for the sum of "$600 and treatment till cured of this trouble by N., medical gymnast," two of the defendant's doctors advised him to take the treatment and represented that he would be cured and that his injuries were slight, that he relied thereon, and that his injuries were much more serious than represented and he could not be cured by the treatment; and that N., while treating him for the defendant, urged him to make the settlement because he would soon be well, notwithstanding that such advice may have been matter of expert opinion, and not intentionally false. *Pattison v. Seattle, Renton & Southern R. Co.* 625

RELEVANCY:

Of evidence in civil actions, see EVIDENCE, 2.

REMAND:

By appellate court for further proceedings, see APPEAL AND ERROR, 38, 39.

RENT:

Water rents, see WATERS AND WATER COURSES, 6-10.

REPEAL:

Of criminal statute, effect, see CRIMINAL LAW, 2, 3.
Implied repeals, see SCHOOLS AND SCHOOL DISTRICTS, 1.

REPORTS:

Of credit associations as libelous, see LIBEL AND SLANDER, 3-5.

REPUGNANCY:

In act, see STATUTES, 8.

RESCISSION:

Lease, see LANDLORD AND TENANT.
Of sale without notice to mortgagee, see MORTGAGES.

RES GESTAE:

In civil actions, see EVIDENCE, 2.

RESIDENCE:

As condition precedent to action for separate maintenance, see HUSBAND AND WIFE, 4.

RES JUDICATA:

See JUDGMENT, 9-12.

RESULTING TRUSTS:

See TRUSTS, 1-3.

RETROACTIVE LAWS:

Operation and construction of, see STATUTES, 9.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR.
Correction of record in same court, see COURTS, 2, 3.
Of executor's or administrator's account, see EXECUTORS AND ADMINISTRATORS, 4.

ROADS:

See HIGHWAYS; RAILROADS; STREET RAILROADS.
Road building to mines, assessment work, see MINES AND MINERALS.
Streets in cities, see MUNICIPAL CORPORATIONS, 22-28.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 1, 8-10, 19-22.

SALES:

Of estate of absentees, see ABSENTEES.
Of adulterated food, see ADULTERATION.
Prohibiting sales as denial of right to acquire, hold, and dispose of property, see CONSTITUTIONAL LAW, 3-5.
Requirements of statute of frauds, see FRAUDS, STATUTE OF.
Of property of infant under order of court, see GUARDIAN AND WARD.
By hawkers or peddlers, see HAWKERS AND PEDDLERS.
Conditional, as waiver of lien, see MARITIME LIENS, 1-3.
Authority of agent to sell, see PRINCIPAL AND AGENT.
Tax sales, see TAXATION, 8, 9, 15, 16, 18-21.
Of real property, see VENDOR AND PURCHASER.

1. SALES—DELIVERY—NUMBER OF ANIMALS—EVIDENCE—SUFFICIENCY. The evidence is insufficient to establish that plaintiff purchased and paid for 150 head of horses, only 85 of which were delivered, where it appears that he purchased defendant's farm and stock at a lump sum of $47,500, and without any segregation of the price as to any separate article, the horses being described in the contract as all horses of a certain brand on the farm "or wherever they may be found," although plaintiff testified that he figured the horses at $10,000, the defendant to deliver them at the farm and guaranteeing 150 head, and where it appears that there was no such guarantee in the written contract and no statement of any definite number, that only 66 head were on the farm, and that plaintiff hired men to find the others on the range. *Patrick v. Watson*..... 76

2. SALES—WRITTEN CONTRACT—ORAL REPRESENTATIONS—ESTIMATE OR GUARANTEE. Where the written contract for the sale of all horses of

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a certain brand on a farm, "or wherever they may be found," did not specify any number, it is conclusive that the same was for an indefinite number, and representations on negotiating a sale that there were 150 to 175 head is a mere estimate and not a guarantee. *Patrick v. Watson* 76

3. SALES—CAVEAT EMPTOR—INSPECTION AND CARE—ESTOPPEL. Where 100 barrels of fish were purchased from packers in December and ordered stored in a warehouse, upon the packers stating that they could not hold them until the expected shipping date, January 15, and the packers delivered the fish after inspecting them according to the ordinary custom, and agreed to have them looked over at intervals while in storage for leakage, the principle of caveat emptor applies, in the absence of fraud; and the duty of inspection and care after January 15 devolved upon the purchaser, who cannot recover for spoiled fish where most of the lot was kept in the storage until June and not examined until August, part of a shipment in April having been found to be spoiled, and it being more difficult to keep fish untainted in the summer than in the winter season, and that strengthening of the brine was generally necessary. *Wieland Brothers v. Chlopeck Fish Co* 508

4. SALES—ACCEPTANCE—TEST TO DETERMINE—PLEADING—ISSUES. In an action for the price of an ice making plant sold under a contract providing for a specified test to determine whether the plant was up to the guarantee, and that at such time the plant should be either rejected or accepted, acceptance to be conclusive and a complete discharge, an answer denying performance according to the guarantee raises no issue, where its effect is offset by admissions showing the performance of the work, a satisfactory test, and an unqualified acceptance by the defendant. *Wolf Co. v. Northwestern Dairy Co.* 665

5. SAME—WARRANTY—BREACH—EFFECT OF ACCEPTANCE. In such a case, a breach of warranty, due to a latent defect not discovered until after the test and acceptance, is no defense or ground for counterclaim, in the absence of fraud. *Wolf Co. v. Northwestern Dairy Co.* 665

6. SAME—PLEADINGS—ANSWER—JUDGMENT ON PLEADINGS. Where the material allegations of a complaint on contract of sale are admitted by the answer, and an alleged breach of warranty set up as a counterclaim is defeated by the admitted acceptance of the work pursuant to a stipulated test whereby the guarantee was to be determined within a time limited, it is proper to enter judgment for the plaintiff on the pleadings, it not appearing that any amendment to the answer could be made, or that leave therefor was asked. *Wolf Co. v. Northwestern Dairy Co* 665

SCHOOLS AND SCHOOL DISTRICTS:

Sufficiency of statutes as dependent on expression of subject in title, see STATUTES, 1.

1. SCHOOLS AND SCHOOL DISTRICTS—CONDITIONS OF MEMBERSHIP—STATUTES—REPEALS—CONFLICT. The act, Laws 1907, p. 569, providing for compulsory attendance upon the public schools, does not conflict with or impliedly repeal the prior act, Laws 1905, p. 262, § 3, subd. 9, providing that successful vaccination shall be required as a condition precedent to school membership; and the two acts together require compulsory vaccination. *State ex rel. McFadden v. Shorrock* 208

2. SAME—COMPULSORY ATTENDANCE AND VACCINATION. The legislature has power to require all minors to attend the public schools and all pupils to be vaccinated. *State ex rel. McFadden v. Shorrock*. 208

3. SAME—STATUTES—EXCEPTIONS PRESUMED. In a law for the compulsory vaccination of all pupils attending the public schools, an exception will be presumed in favor of individuals whose health is such as to render the operation dangerous or injurious. *State ex rel. McFadden v. Shorrock*..... 208

4. SAME—EXCEPTIONS—STATUTES—DEFINITENESS. A law requiring "successful vaccination" of school children is not too indefinite for enforcement because of its failure to define the terms used; and permitting attendance after the usual reaction, or after three operations without reaction, is not a violation of the statute, but a recognition of an intended exception. *State ex rel. McFadden v. Shorrock* 208

SEPARATE ESTATE:

Of married women, see HUSBAND AND WIFE, 3.

SEPARATION:

See HUSBAND AND WIFE, 4, 5.

SERVICE:

See WORK AND LABOR.

SET-OFF AND COUNTERCLAIM:

Of improvements against damages or mesne profits, see EJECTMENT.
In action for price of goods sold, see SALES, 4-6.
Value of use by cotenant in possession, against claim for taxes, see TENANCY IN COMMON.

SETTLEMENT:

See RELEASE.
Of bill of exceptions or statement of facts, see APPEAL AND ERROR, 14, 15.
Condition precedent to action by partner on account, see PARTNERSHIP.

SHIPPING:

See MARITIME LIENS.

STATEMENT:

Of case or facts for purpose of review, see APPEAL AND ERROR, 12-15.
Of plaintiff's claim, see PLEADING, 1.
By witness inconsistent with testimony, see WITNESSES, 2.

STATEMENT OF FACTS:

See APPEAL AND ERROR, 12-15.

STATES:

Legislative power, see CONSTITUTIONAL LAW, 4.

STATUTE OF FRAUDS:

See FRAUDS, STATUTE OF.

STATUTES:

See ADVERSE POSSESSION; CONTEMPT; MARITIME LIENS; MECHANICS' LIENS.
Note given in violation of law, see BILLS AND NOTES, 2.
Granting special privileges or immunities, see CONSTITUTIONAL LAW.
Repeal, effect on pending prosecutions, saving clause, see CRIMINAL LAW, 2, 3.
Improvements in ejectment, see EJECTMENT.
Implied repeal, see ELECTIONS, 2; SCHOOLS AND SCHOOL DISTRICTS, 1.
Registration of voters, see ELECTIONS.
Construction of legislative validation of franchise, see FRANCHISES.
Statutes of limitation, see LIMITATION OF ACTIONS.
Municipal ordinances, see MUNICIPAL CORPORATIONS, 1-3.
Public improvements, see MUNICIPAL CORPORATIONS, 8, 18.
Ordinances respecting garbage, validity, see MUNICIPAL CORPORATIONS, 20, 21.
Construction, see SCHOOLS AND SCHOOL DISTRICTS, 1, 3, 4.
Definiteness, see SCHOOLS AND SCHOOL DISTRICTS, 4.
Sale of land for nonpayment of taxes, see TAXATION, 8-11, 16.

1. STATUTES — TITLE AND SUBJECTS — SCHOOL LAWS — VACCINATION. The provision in the school law for compulsory vaccination is within and germane to the title "An act to establish a general and uniform system of public schools," since the title need not be a complete index of the act, and may cover but one general subject, and the clause but defined the class of persons permitted to attend school and includes the means of effecting the object sought. *State ex rel. McFadden v. Shorrock* 208

2. STATUTES—SUBJECTS AND TITLES. An act entitled an act "relating to electric railways . . . and the use of streets and roads thereby" is sufficiently comprehensive to embrace provisions relating to the granting of franchises therefor by the legislative authority of cities. *Ewing v. Seattle* 229

STATUTES—CONTINUED.

3. STATUTES—TITLE AND SUBJECTS—ELECTIONS. Laws 1909, p. 174, § 4, entitled an act relating to primary elections and amending certain sections of the direct primary law, and which amends Laws 1907, p. 464, § 12, is void as an amendment of the registration law, in so far as it requires the registration of the elector's party affiliations to entitle him to vote at a primary election, in that there is no reference in its title to the subject of registration, as required by Const., art. 19, § 2, and no reference to Laws 1907, p. 464, § 12, amended by the act. *State ex rel. Arnold v. Mitchell*..... 513

4. STATUTES—AMENDMENTS—TITLES AND SUBJECTS—ELECTIONS. Laws 1909, p. 174, § 4, amending the direct primary law, Laws 1907, p. 464, § 12, so as to require the registration of the elector's party affiliations in order to vote at a primary election, is void as an amendment to the registration law, Bal. Code, § 1455, in that it does not set forth the section in full as amended and is not a complete act upon the subject of registration. *State ex rel. Arnold v. Mitchell* 513

5. STATUTES—CONSTRUCTION—"PASSAGE OF ACT." The proviso to Laws 1907, p. 398 (for the limitation of actions to set aside a tax deed), that the act shall not apply to certain actions if commenced within one year "after the passage of the act," has reference to the time when the act received the final sanction necessary to constitute it a law, and not to the time when the law went into effect, ninety days after the adjournment of the legislature; since there is no reason to give any technical or other than the ordinary meaning to the words. *Cordiner v. Dear*..... 479

6. STATUTES—CONSTRUCTION—MAY AND SHALL—CONTEMPT. A statute providing that the court "may" award damages for a civil contempt in addition to punishment, being remedial in its nature, will be construed to mean "shall," where the aggrieved party asks for and is willing to take the same in such proceeding in lieu of an ordinary action. *State ex rel. Nicomen Boom Co. v. North Shore Boom and Driving Co*..... 1

7. STATUTES—CONSTRUCTION BY EXECUTIVE DEPARTMENTS. The construction placed upon a statute by the executive department does not control the courts when it deprives a citizen of valuable rights accorded him by the law. *State ex rel. Pindall v. Ross*..... 242

8. STATUTES—PROVISOS—REPUGNANCY—HAWKERS AND PEDDLERS—LICENSE. The proviso to Laws 1909, p. 737, § 3, that county peddlers' licenses shall expire by limitation on the second Monday in January succeeding the year in which they were issued, is wholly inconsistent with and repugnant to the body of the act requiring the issuance of an annual license authorizing the licensee to do business for the term of one year from the date thereof, and is therefore inoperative and void. *McKnight v. Hodge*..... 289

STATUTES—CONTINUED.

9. STATUTES—RETROACTIVE LAWS—CURATIVE ACTS—MUNICIPAL CORPORATIONS—COUNTIES—FRANCHISES. The legislature has power to pass a retroactive curative statute which validates the *ultra vires* county grant of franchises in public roads outside of the limits of a city, actually occupied, although the territory has since become incorporated as a town of the fourth class. *Spring Water Co. v. Monroe* 195

STAY:

Pending appeal or writ of error, see APPEAL AND ERROR, 11.

STENOGRAPHERS:

Incorporating stenographer's report in record on appeal, see APPEAL AND ERROR, 14.

STIPULATIONS:

To hear motion in another county, see COURTS, 3.
In contracts as to liquidated damages or penalties, see DAMAGES, 1.
As to damages, see EMINENT DOMAIN, 12.

STOCKHOLDERS:

Of corporations, see CORPORATIONS, 3.

STREET RAILROADS:

Exercise of power of eminent domain, see EMINENT DOMAIN.
Collision with team, relevancy of statements of conductor, see EVIDENCE, 2.
Sufficiency of title of act granting franchise, see STATUTES, 2.

1. STREET RAILROADS—FRANCHISES—RESTRICTIONS—MUNICIPAL CORPORATIONS—CHARTERS—STATUTES. Charters adopted by cities of the first class are subject to and controlled by general laws; and Laws 1907, p. 192, authorizing cities to grant franchises to street railroads and to prescribe the terms and conditions thereof, supersedes the city charter of Seattle, art. 4, § 23, requiring such franchises to be sold at public auction to the highest bidder. *Ewing v. Seattle*.. 229

2. STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY. It cannot be said as a matter of law, that the driver of a heavy meat wagon with a slow team is guilty of contributory negligence in driving upon a street car track to pass a wagon, thinking he had time to make the turn before the arrival of a street car which he saw approaching one block away, but the reciprocal duties of the driver and the motorman present a question for the jury. *Henry v. Seattle Electric Co*..... 444

3. STREET RAILROADS—COLLISION WITH VEHICLE—CONTRIBUTORY NEGLIGENCE OF DRIVER—QUESTION FOR JURY. The driver of an express

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wagon is not guilty of contributory negligence as a matter of law, in driving upon a street car track in a crowded street in a populous city, after seeing a car half a block away approaching on a slight down grade at the rate of three or four miles an hour. *Keefe v. Seattle Electric Co*..... 448

4. SAME. It is not contributory negligence, as a matter of law, to stop upon the street car track to await the passing of teams blocking the way, while a car some distance away is approaching at the rate of three or four miles an hour; since the driver may assume that the car is under control, and the reciprocal duties of the driver and motorman raise a question for the jury. *Keefe v. Seattle Electric Co.* 448

5. STREET RAILROADS—COLLISION WITH AUTOMOBILE—NEGLIGENCE—INSTRUCTIONS. In an action for damages from a head-on collision of a street car and an automobile, it is error to refuse to give an instruction to the effect that the motorman had a right to assume, until the danger became imminent, that the automobile would turn off the track, where there was evidence that the automobile was skidding on slippery rails, that the driver could have stopped it any time within one hundred feet of the car, but took the chance of guiding it off and made no effort to stop until within ten or twelve feet of the car, especially where there was evidence that the car had come to a full stop before the collision. *Pantages v. Seattle Electric Co.* 453

6. STREET RAILROADS—COLLISION AT CROSSING—CONTRIBUTORY NEGLIGENCE—DUTY TO LOOK AND LISTEN—QUESTION FOR JURY. The driver of a team is not guilty of contributory negligence, as a matter of law, in starting across an electric railway crossing, where he saw a car that had just passed him standing at a station 230 feet away, the indications being that it would continue in the same direction, and he supposed he was crossing the track behind it, when it started back; and in such a case the plaintiff is not required to stop, look and listen before driving on the track, but it is the duty of the company to have the car under control. *Wilson v. Seattle, Renton & Southern R. Co*..... 651

STREETS:

See MUNICIPAL CORPORATIONS, 22-30.

Grant of rights in street and roads to street railways, see STREET RAILROADS, 1.

SUIT:

Nature and incidents of civil actions, see ACTION.

SUIT MONEY:

As condition to bringing suit to vacate divorce, see DIVORCE, 2.

In action for maintenance, see HUSBAND AND WIFE, 5.

SUMMONS:

In tax foreclosure, see TAXATION, 10-13.

SUPERSEDEAS:

On appeal or writ of error, see APPEAL AND ERROR, 11.

SUPPLIES:

Maritime liens for supplies to vessel, see MARITIME LIENS.

SURETYSHIP:

See PRINCIPAL AND SURETY.

SURGEONS:

See PHYSICIANS AND SURGEONS.

SURRENDER:

Of lease, see LANDLORD AND TENANT.

SURVEYS:

Description of boundaries, see BOUNDARIES.

TAXATION:

Tax certificate as color of title, see ADVERSE POSSESSION.
Tender of tax, necessity of finding, see APPEAL AND ERROR, 7½.
License fee for peddlers as revenue measure, see CONSTITUTIONAL LAW, 4.
Municipal improvements, see MUNICIPAL CORPORATIONS.
Cotenant's claim for taxes paid, offset, see TENANCY IN COMMON.

1. TAXATION—LISTING—MISTAKE—EVIDENCE. The evidence of a mistake of fact in listing property for taxation must be clear, cogent, and convincing in order to overcome the presumption arising from the sworn detail sheet. *Peacock Mill Co. v. Honeycutt*..... 18

2. SAME—MISTAKE OF LAW—RELIEF—RESTRAINING COLLECTION OF TAX. Where wheat was orally purchased in February, but the title did not pass until it was delivered on March 7th, and the purchaser's manager, without looking up the dates but knowing that the wheat was delivered after that date, listed the same for taxation as of March 1st, after the assessor informed him that the vendor refused to pay, his error was a mistake of law, and not of fact, which a court of equity cannot relieve, by restraining collection of the tax, in the absence of fraud or misrepresentation. *Peacock Mill Co. v. Honeycutt*..... 18

3. TAXATION—EXCESSIVE ASSESSMENT—EVIDENCE—SUFFICIENCY. In an action to reduce an assessment upon lands containing springs used for a city water supply, it is no evidence of overvaluation that farming lands in the vicinity were assessed at a less rate, or that other springs were assessed less, in the absence of proof that they were in demand for a similar use. *Vancouver Water Works Co. v. Clarke County* 112

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4. SAME—FRANCHISE. The assessment of a city water company's franchise is not shown to be excessive from the fact that the franchises of telephone and light companies were less, there being no evidence to form a basis of comparison. *Vancouver Water Works Co. v. Clarke County*..... 112

5. SAME—PRESUMPTION TO SUPPORT. An assessor acts in a *quasi* judicial capacity, and it requires clear evidence to overcome the presumption that he acted in a proper manner in fixing valuations. *Vancouver Water Works Co. v. Clarke County*..... 112

6. TAXATION — EXCESSIVE ASSESSMENTS—EVIDENCE—APPEAL—REVIEW. An assessment cannot be disturbed for mere overvaluation, in the absence of fraud or capriciousness, and clear evidence to overcome the liberal presumption that the assessor performed his duty in a proper manner; and a finding sustaining an assessment will not be disturbed upon conflicting evidence of values, in the absence of fraud. *Northern Pac. R. Co. v. Pierce County*..... 108

7. SAME—CERTIFICATE OF DELINQUENCY—TIME FOR ISSUANCE. Where a tax for 1895 became delinquent May 31, 1896, by the law then in force, and a certificate of delinquency issued Aug. 1, 1901, for taxes for the year 1895, more than five years had elapsed, as required by the act of 1901. *Timmerman v. McCullagh*..... 204

8. TAXATION—SALE OF LAND—FORECLOSURE OF CERTIFICATE—STATUTES—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT. A certificate of purchase of lands forfeited to a county for taxes, pursuant to Laws 1893, p. 323, §§ 115, 134, entitles the holder to a tax deed upon application within one year after the time for redemption expires; and the certificate was not converted into a certificate of delinquency that could be foreclosed by the act of 1897, p. 136, § 116, since the legislature could not impair the obligation of the contract; and an action to foreclose the same is properly dismissed. *Barker v. Muehler*..... 411

9. SAME—STATUTES—CONSTRUCTION. Laws 1897, p. 136, § 116, authorizing the foreclosure of prior tax liens is expressly limited to lands forfeited to the county for taxes due and remaining unpaid at the date of the passage of the act, and was not intended to apply to forfeited lands upon which the taxes had already been paid by purchasers and certificates of purchase issued under the law of 1893. *Barker v. Muehler*..... 411

10. TAXATION — FORECLOSURE — SUMMONS — INCORRECT STATEMENT OF DATE. A county tax foreclosure of a general delinquency certificate is not void because the summons for publication incorrectly stated the date of the certificate; such requirement being descriptive only and to aid in identification, and is not essential to the jurisdiction of the court nor fatal to the proceedings, in the absence of a showing that the party was misled. *Timmerman v. McCullagh*..... 204

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11. TAXATION — FORECLOSURE — SUMMONS FOR PUBLICATION—SUFFICIENCY. Under Laws 1897, p. 182, § 96, subd. 3, a summons by publication requiring the defendant to appear within sixty days after the "service" of the summons is not in accordance with the statute, and is insufficient to confer jurisdiction to enter a judgment of default. *Hembree v. McFarland*..... 605

12. TAXATION—FORECLOSURE—SUMMONS—FORM. An individual tax foreclosure and deed is void as to an owner of a one-sixth interest, and his successor, where there was no personal service and the summons for publication required an appearance within sixty days after service of the summons. *Flueck v. Pedigo*..... 646

13. TAXATION—FORECLOSURE—SUMMONS—CERTAINTY—DESCRIPTION OF LAND. A tax foreclosure summons is not so uncertain as to render the judgment void merely because of the use of the word "or" instead of "of" in describing the "N. E. ¼ of the S. W. ¼" of a certain section, where it was followed by "40 acres," denoting the quantity of the land. *Stanchfield v. Blessing*..... 620

14. TAXATION—PROCEEDINGS—GENERAL RELIEF—JURISDICTION. A tax foreclosure is a special proceeding for a special purpose, and if it fails, the court cannot retain jurisdiction to grant general relief or establish an equitable lien for taxes paid. *Barker v. Muehler*.. 411

15. SAME—SALE—VALIDITY—EXCESSIVE AMOUNT. A tax foreclosure judgment and sale is not void because of an overcharge of interest, since the owner has an opportunity to defend and is estopped to raise any but jurisdictional questions. *Timmerman v. McCullagh* 204

16. SAME—TAX DEED—LIMITATIONS. A certificate of purchase issued for lands forfeited to a county for taxes under the act of 1893, is void under § 133 of the act, if a deed is not taken out and recorded within one year after the expiration of the time for redemption. *Barker v. Muehler*..... 411

17. TAXATION—JUDGMENT—DIRECT ATTACK. An action to recover possession of lands sold for taxes and to set aside the tax judgment is a direct and not a collateral attack upon the tax foreclosure. *Hembree v. McFarland*..... 605

18. SAME—COLLATERAL ATTACK—PRESUMPTIONS. A tax foreclosure judgment and sale cannot be attacked collaterally because the officer making the sale did not have a certified copy of the order of sale, where the officer in his return recites that the order was "directed and delivered" to him; since all presumptions are in favor of the regularity of the proceedings. *Timmerman v. McCullagh*..... 204

19. TAXATION—JUDGMENT AND SALE—VACATION—MERITS—TENDER OF TAX. The rule that an action to vacate a judgment cannot be maintained without an allegation of a meritorious defense has no appli-

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cation to proceedings to vacate a void tax judgment, the statute requiring only a tender of the taxes paid; such tender and the validity of the tax judgment being, moreover, a meritorious defense. *Holly v. Munro* 311

20. TAXATION—FORECLOSURE AND SALE—SETTING ASIDE—LACHES. A nonresident who failed to pay taxes for six years is not estopped by laches from bringing action to set aside a void tax foreclosure, where there were no material changes in the value of the property, and she did not know, until about a year prior to action, of the attempted foreclosure or possession by the defendant. *Hembree v. McFarland* 605

21. TAXATION—RECOVERY OF LAND SOLD FOR TAXES—TENDER OF TAX. Under Bal. Code, §§ 5678, 5679, a tender of the tax is a condition precedent which must be pleaded and proved in an action to recover land sold for taxes. *Thompson v. Emerson* 138

TENANCY IN COMMON:

1. TENANCY IN COMMON—PAYMENT OF TAXES—OFFSET. The value of the use of premises by a cotenant in possession may properly be offset against such tenant's claim for taxes paid. *Del Notaro v. Douglas* 493

TENDER:

Of taxes due as condition precedent to attack on tax title, see TAXATION, 19, 21.

TEST:

To determine guarantee on sale of ice-making plant, see SALES, 4.

TIMBER:

Cutting logs, see LOGS AND LOGGING.

TIME:

For taking exception to ruling for purpose of review, see APPEAL AND ERROR, 7.

For taking appeal or suing out writ of error, see APPEAL AND ERROR, 9, 10.

For voluntary dismissal of action, see DISMISSAL AND NONSUIT, 1.

Establishment of highway by prescription, see HIGHWAYS.

Of taking effect of statute, see STATUTES, 5.

For issuance of certificate of delinquency, see TAXATION, 7.

TITLE:

Color of title, see ADVERSE POSSESSION.

Of purchaser of note, see BILLS AND NOTES, 1.

Of ordinance, see MUNICIPAL CORPORATIONS, 2, 3.

Removal of cloud, see QUIETING TITLE.

Of statutes, see STATUTES, 1-4.

Sufficiency of title of vendor of land, see VENDOR AND PURCHASER, 1.

TOOLS:

Liability of employer for defects, see MASTER AND SERVANT, 2-7.

TORTS:

See LIBEL AND SLANDER; NEGLIGENCE.
Damages, inadequate or excessive, see DAMAGES, 7-15.
Of cities, see MUNICIPAL CORPORATIONS, 35.
Malpractice, see PHYSICIANS AND SURGEONS, 2, 3.
Injuries caused by operation of street cars, see STREET RAILROADS.

TRANSITORY ACTIONS:

See VENUE.

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Cutting of logs, see LOGS AND LOGGING.

TRIAL:

Necessity for exceptions or objections in lower court, see APPEAL AND ERROR, 4, 5.
Necessity for findings of fact to review, see APPEAL AND ERROR, 7½.
Review of discretionary action, see APPEAL AND ERROR, 23, 24.
Conclusiveness of findings on conflicting evidence, see APPEAL AND ERROR, 29, 30.
Review of rulings as dependent on prejudicial nature of error, see APPEAL AND ERROR, 31-36.
In criminal prosecutions, see CRIMINAL LAW, 5.
View by jurors in condemnation proceedings, see EMINENT DOMAIN, 14.
Laches in bringing case to trial, see MANDAMUS, 3.
Amendment of pleading during trial, see PLEADING, 4, 5.
Amendments to conform to proof, see PLEADING, 4, 5.
Examination of witnesses, see WITNESSES.

1. TRIAL—APPEARANCE—CONSENT—JURISDICTION—HEARING AT CHAMBERS. After appearance before a judge and presentation of a motion, it cannot be objected that the judge heard the motion "in chambers" instead of in open court in the court house, Const. art. 4, § 6, providing that the courts shall always be open. *Meisenheimer v. Meisenheimer* 32

2. TRIAL—EVIDENCE—WAIVER OF OBJECTIONS—EXECUTION OF BOND. The admission in evidence of the bond, in suit "by consent of both parties," waives proof of execution of the bond. *Helmer v. Title Guaranty & Surety Co*..... 558

3. TRIAL—PROVINCE OF COURT AND JURY—EXPERT EVIDENCE. A statement by expert witnesses that a disease cannot develop under certain conditions does not require withdrawal of the issue from the jury, where there was a question for the jury as to the existence of the facts recited on which the conclusion was based. *Helland v. Bridenstine* 470

TRIAL—CONTINUED.

4. TRIAL—DIRECTED VERDICT—PROVINCE OF COURT AND JURY. A verdict of dismissal *non obstante veredicto* may be granted where, under the facts, no possible recovery could be had. *Spokane Grain Co. v. Great Northern Express Co.*..... 545

5. TRIAL—INSTRUCTIONS—ORDINARY CARE—PROVINCE OF COURT AND JURY. It is not error for the court to refuse to determine for the jury the exact standard of ordinary care, but it is sufficient to state the general principles of law governing the case. *McKenzie v. North Coast Colliery Co.*..... 495

6. TRIAL—INSTRUCTIONS—WEIGHT TO BE GIVEN FACTS. It is not error to instruct the jury that they are exclusive judges of all questions of fact and the "weight to be given any particular fact," especially when immediately followed by an instruction that it is their duty to accept the law from the court. *Staats v. Pioneer Insurance Association* 51

7. TRIAL—INSTRUCTIONS—PLEADINGS AS EVIDENCE—ADMISSIONS. An instruction that the pleadings taken to the jury room are not evidence, and that the jury must determine the cause from the evidence and admissions laid before them, is not objectionable as precluding the jury from considering admissions in the pleadings, where the court had previously pointed out certain admissions in the pleadings. *Staats v. Pioneer Insurance Association*..... 31

8. TRIAL—INSTRUCTIONS. It is not error to refuse requested instructions covered in the general charge. *State ex rel. Merriam v. Superior Court* 64

9. TRIAL—INSTRUCTIONS—ISSUES. Error cannot be assigned upon the giving of instructions outside the issues, where they were based on evidence admitted without objection. *Johnson v. Caughren*. 125

10. SAME—REQUESTS. It is not error to refuse requested instructions covered in the general charge. *Johnson v. Caughren*..... 125

11. TRIAL—INSTRUCTIONS—ISSUES AND PROOF—SUBMISSION—ELECTION OF REMEDIES. Where plaintiff alleged in distinct counts, one cause of action for breach of contract and loss of profits, and another on *quantum meruit* covering the same subject-matter, it is error to submit the latter issue to the jury where there was no evidence to warrant it; and is prejudicial, requiring a reversal (although no election was demanded), where it cannot be determined whether the verdict was based upon the true or false issue. *Gabrielson v. Hague Box & Lumber Co.*..... 342

12. TRIAL—INSTRUCTIONS AS A WHOLE. Error cannot be assigned upon the giving of instructions which as a whole fairly presented the case to the jury. *Sudden & Christenson v. Morse*..... 372

13. SAME—REQUESTS. It is not error to refuse requested instructions which were covered in the general charge. *Sudden & Christenson v. Morse*..... 372

TRIAL—CONTINUED.

14. TRIAL—INSTRUCTIONS—HARMLESS EXPRESSIONS. It is not prejudicial error, that in directing the form of the verdict, the court inadvertently started to say what the form should be if the jury should "happen" to find for a party, where the remark was immediately corrected. *Averbuch v. Great Northern R. Co.*..... 633

15. SAME—REQUESTS—FORM OF INSTRUCTIONS. A party is not entitled to an instruction in any particular form of words, where its substance is given. *Averbuch v. Great Northern R. Co.*..... 633

16. TRIAL—VERDICT—SEVERAL DEFENDANTS—FORMS — OBJECTIONS. In an action for personal injuries against several defendants who could have been held jointly or severally, if all were guilty of negligence, a verdict against one only, not objected to at the time, is not fatally defective for failing to dispose of the issues as to the other defendants. *Nelson v. Bromley*..... 256

17. TRIAL—SPECIAL INTERROGATORIES—DISCRETION. The refusal to submit special interrogatories to a jury is discretionary, and error cannot be predicated thereon. *Keane v. Seattle*..... 622

18. TRIAL—VERDICT—SPECIAL INTERROGATORIES — DISCRETION. The refusal to submit special interrogatories to the jury is discretionary and will not be reviewed except for manifest abuse of discretion. *Sudden & Christenson v. Morse*..... 372

19. TRIAL—VERDICT—SPECIAL FINDINGS—CONSISTENCY. Where, in an action on contract, the defense relied upon the plaintiff's failure to secure a certain option, and there was a dispute between the parties as to whether the agreement for obtaining the option was entered into at San Francisco or was arranged between the parties by letter and completed subsequently, the finding of the jury, in an answer to an interrogatory, that the plaintiff did not obtain an option "in accordance with the agreement made in San Francisco," is not inconsistent with a general verdict for the plaintiff, but implies that the option was obtained subsequently; since special findings susceptible of a construction conforming to the verdict will be so construed. *Sudden & Christenson v. Morse*..... 372

TROVER AND CONVERSION:

Conversion of live stock shipped, see CARRIERS.
Misappropriation of corporate funds by officer, see CORPORATIONS, 4.

TRUSTS:

Form of action, see ACTION, 1.
Action to enforce, see VENUE.

1. TRUSTS—RESULTING TRUST—GIFT—ADVANCEMENT—EVIDENCE—SUFFICIENCY. It appears that property purchased by a parent in the name of her daughter, with whom she lived, was intended as a gift or advancement to the daughter, without any trust, except during the lifetime of the owner, where it appears that after her daughter's

TRUSTS—CONTINUED.

death, she procured her daughter's husband to execute a quitclaim deed to her daughter's daughter, and was satisfied, although he inserted a condition in the deed not desired by her. *Adley v. Pletcher* 82

2. SAME—PRESUMPTIONS. The purchase of property by a parent in the name of a child raises a presumption of a gift, and rebuts the presumption of a resulting trust. *Adley v. Pletcher*..... 82

3. TRUSTS—RESULTING TRUSTS—EVIDENCE—SUFFICIENCY. In order to establish a trust in mining claims by virtue of a parol agreement, for an interest, the testimony must be clear, cogent, and convincing; and is insufficient, where the trust is based on a grub stake agreement whereby defendant was to prospect and locate mining claims for, and as an equal partner of, the plaintiff, who was to furnish the funds, and where the evidence as to such an arrangement is conflicting, the plaintiff and defendant were close friends, the plaintiff's letters indicate that at first he claimed no legal interest in the property, he did not furnish any of the money to develop the mine, made no claim to it during five years that it was being developed at great expense, and his evidence at the trial ten years after the agreement is unsatisfactory. *Denny v. Holden*..... 22

4. TRUSTS—DEED IN TRUST—EVIDENCE TO ESTABLISH—SUFFICIENCY. In an action to quiet title, the evidence is insufficient to show that an absolute deed made by a husband and wife was in trust, where the wife's testimony to that effect was contradicted by her husband, who testified that he negotiated the sale and that the deed was made upon full consideration. *Palmer v. Abrahams*..... 352

TRUTH:

As justification of libel, see LIBEL AND SLANDER, 9, 10.

USE AND OCCUPANCY:

Liability of cotenant for use and occupation, see TENANCY IN COMMON.

VACATION:

Of streets, as property, see EMINENT DOMAIN, 3.
Of judgment by default, see JUDGMENT, 1-3, 10.
Of streets or alleys, see MUNICIPAL CORPORATIONS, 8.

VACCINATION:

Compulsory, in schools, see SCHOOLS AND SCHOOL DISTRICTS.

VALUE:

Of land appropriated for public use as measure of compensation, see EMINENT DOMAIN, 8-10.
Determination of value of property for purpose of taxation, see TAXATION, 2-6.

VARIANCE:

See PLEADING, 5.

VENDOR AND PURCHASER:

Compensation of broker procuring conveyance, see BROKERS.
Liquidated damages for breach of contract for purchase of land, see DAMAGES, 1.
Option in lease, see LANDLORD AND TENANT, 1, 2.
Suit to recover deposit from agent, see MONEY RECEIVED.
Rescission without notice to mortgagee, see MORTGAGES.

1. VENDOR AND PURCHASER—MERCHANTABLE TITLE. An abstract of title failing to show a conveyance from the patentee and requiring parol evidence to show inheritance from him and adverse possession thereunder, does not show a merchantable title which can be forced upon an unwilling purchaser. *Watson v. Boyle*..... 141

2. VENDOR AND PURCHASER—BONA FIDE PURCHASER—NOTICE—RECORDS—BURDEN OF PROOF. The burden of proving actual notice of an unrecorded conditional bill of sale, or of a claim not of record, is upon the party asserting the priority of the sale or claim. *Scott v. Farnam*..... 336

3. VENDOR AND PURCHASER—MORTGAGED PROPERTY—BONA FIDE PURCHASER—PRIORITIES. Purchasers of the separate property of the wife, with knowledge of a void mortgage thereon executed by the husband alone, are not liable for the mortgage, when there was no intent to pay the same; and the fact that they retained $200 of the purchase money to contest the mortgage, is not a recognition of the mortgage, but rather the contrary. *Christopher v. Ferris*..... 534

4. VENDOR AND PURCHASER—MORTGAGE BY VENDEE—RIGHTS OF MORTGAGEE AGAINST VENDOR—RESCISSION—PAYMENTS—RECOVERY. Where a vendor, after accepting a final payment made by the vendee's mortgagee to protect his lien, secured a cancellation of the sale and a deed from the vendee, and resold the property after redeeming the mortgage, his personal liability to the mortgagee for the payment made on the purchase price depends upon whether the resale was made to a *bona fide* purchaser for value, and if so, the price received on the resale is immaterial. *Scott v. Farnam*..... 336

5. VENDOR AND PURCHASER—MORTGAGE BY VENDEE—RIGHTS OF MORTGAGEE AGAINST VENDOR. Where a vendee in possession mortgaged the property before full payment, and the mortgagee foreclosed, and in order to protect his lien, made final payment of the purchase price, the vendee being unable to do so, the vendor, who accepted the payment, is personally liable to the mortgagee for the amount of the same, where it appears that with notice of the final payment, he secured a rescission of the sale and a deed from the vendee, redeemed the property from the mortgage, and resold the property to an innocent purchaser for value, thereby cutting off the mort-

VENDOR AND PURCHASER—CONTINUED.

gagee's equitable lien for the purchase price paid; since the vendee's mortgage was an equitable assignment of the vendee's interest, giving the mortgagee the right to complete the purchase and precluding a rescission thereof without the mortgagee's consent. *Scott v. Farnam* 336

VENUE:

Criminal prosecutions, see CRIMINAL LAW, 4.
Mandamus to secure change of, see MANDAMUS, 1.

1. VENUE—CHANGE—TRANSITORY ACTION. An action to establish and enforce a trust in real and personal property is transitory, as the decree acts *in personam*, and the venue is properly changed to the county of defendants' residence. *State ex rel. Scougale v. Superior Court* 328

VERDICT:

Review on appeal or writ of error, see APPEAL AND ERROR, 25-28.
In civil actions, see TRIAL, 16-19.

VESTED RIGHTS:

Franchises, see MUNICIPAL CORPORATIONS, 29.

VOLUNTARY NONSUIT:

See DISMISSAL AND NONSUIT.

WAIVER:

Of exceptions or objections, see APPEAL AND ERROR, 4-6.
Of error, see APPEAL AND ERROR, 19-21.
Jurisdiction, see COURTS, 3.
Right to avoid, see INSURANCE, 1, 5, 6-9.
Of lien, see MARITIME LIENS, 2-4.
Of objection to parties, see MECHANICS' LIENS, 3.
Admission of evidence, see TRIAL, 2.

WARDS:

See GUARDIAN AND WARD.

WARRANTS:

City warrants, see MUNICIPAL CORPORATIONS, 36-38.
On sale of goods, see SALES, 2, 5, 6.

WATERS AND WATER COURSES:

1. WATERS AND WATER COURSES—DRAINS—SEVERANCE OF OWNERSHIP—COVENANTS—DOMINANT AND SERVIENT ESTATES. Where the owner, for his own convenience, constructed a drain across two lots to an outlet, and afterwards conveyed the dominant and servient estates to different parties by warranty deed, no obligation rests upon the

WATERS AND WATER COURSES—CONTINUED.

grantee of the dominant estate to remove or close the drain, but the burden thereof rests upon the grantee of the servient estate. *Schade Brewing Co. v. Falls City Pickle Works*..... 202

2. WATERS AND WATER COURSES—LICENSES—REVOCATION. Permission to divert the waters of a creek on defendants' land by a ditch for domestic and irrigation purposes, the defendants refusing to either sell or convey a permanent right of way, is a license merely, revocable at will. *Weidensteiner v. Mally*..... 79

3. SAME—ADVERSE POSSESSION—PRESCRIPTIVE RIGHT—REPUDIATION OF LICENSE. The use of a ditch to convey waters for the statutory period, given by a license, will not ripen into a prescriptive right, where there was no repudiation of the license with notice thereof to the licensor. *Weidensteiner v. Mally*..... 79

4. SAME—ADVERSE POSSESSION — HOSTILE CLAIM — LICENSE. An attempt to make a statutory appropriation of water, used under a license, does not amount to an adverse claim, where it was not so intended, being merely to prevent appropriation by others, and the licensor had no notice of any adverse claim. *Weidensteiner v. Mally* 79

5. SAME—APPROPRIATION. Waters of a creek already appropriated are not subject to appropriation under the statute. *Weidensteiner v. Mally* 79

6. WATERS AND WATER COURSES — PUBLIC SUPPLY — WATER RATES — PROFITS—MUNICIPAL CORPORATIONS — FISCAL MANAGEMENT —SEPARATE FUNDS. A city owning its own water works has a right to fix reasonable water rates which will result in some profit, and will not be enjoined from transferring the profits on the system from the water fund to the general fund, in the absence of any statute requiring the water fund to be kept for a special purpose. *Twitchell v. Spokane* 86

7. SAME—WATER RATES—TAXES. Water rates paid by consumers for city service are in no sense taxes. *Twitchell v. Spokane*..... 86

8. SAME—FREE WATER. A city owning its water system may furnish water for municipal and charitable purposes free. *Twitchell v. Spokane* 86

9. SAME—REASONABLENESS OF RATES. On the question of the reasonableness of water rates, the cost of extending water mains and depreciation may be considered. *Twitchell v. Spokane*..... 86

10. SAME—REASONABLENESS OF RATES. A water rate of 80 cents a month for a five-room house with bath, toilet, and lavatory, and $2.80 per year for a lawn 60x135 feet, is reasonable. *Twitchell v. Spokane* 86

11. SAME—REVIEW. City authorities have a discretion in fixing water rates which will not be reviewed unless the rate is excessive. *Twitchell v. Spokane*..... 86

WILLS:

Provision for compensation of executor, see EXECUTORS AND ADMINISTRATORS, 1, 2.

1. WILLS—NONINTERVENTION WILL—EXECUTORS AND ADMINISTRATORS—NECESSITY OF ADMINISTRATION. Where a will devised property to two individuals, one of whom was not a trustee, and provided that if either refused to accept the trust, another be appointed in his stead by the court probating the will and settling the estate, the will is not a "nonintervention" will; since it is necessary under Bal. Code, § 6196, that the intention to dispense with administration be shown by express words or necessary implication. *Shufeldt v. Hughes* 246

2. WILLS—NONRESIDENTS—NECESSITY OF PROBATE. Where a nonresident testator dies leaving real estate in this state, it is necessary that his will be probated here. *Shufeldt v. Hughes*..... 246

WITNESSES:

Opinions, see EVIDENCE, 3-6.

1. WITNESSES—EXAMINATION—IMPEACHMENT—TIME — ORDER OF EVIDENCE. It is not an abuse of discretion to permit the recall of defendant's witness, after defendant rested, for the purpose of asking impeaching questions which should have been asked on cross-examination, where but a short time had elapsed and defendant was allowed to call witnesses and was denied no right or privilege. *Juul v. Kitsap Transportation Co*..... 156

2. SAME—MATERIALITY OF IMPEACHING QUESTIONS. In an action for injuries sustained by the alleged pulling in of a gang plank, upon which plaintiff was walking off a boat, where a witness for defendant testified that he was ahead of the plaintiff, and that plaintiff fell by reason of tripping on the witness' feet after getting clear of the plank, it is proper to allow impeaching questions tending to show that witness stated shortly after the accident that he felt the plank slipping before he reached the dock. *Juul v. Kitsap Transportation Co.* 156

3. WITNESSES—IMPEACHMENT—PREJUDICE OR INTEREST—PERJURY. On a trial for perjury committed in a civil action, the accused has a right to show that the principal witnesses against him are interested in the civil action, which was still pending for trial, and would profit by his conviction under Bal. Code, § 5992, rendering a person convicted of perjury incompetent to testify therein. *State v. Eaid* 302

WORK AND LABOR:

1. WORK AND LABOR—PERSONS LIABLE. Ownership of an article by defendant is not essential to a recovery for repairs thereon made at the instance and request of the defendant. *Pacific Iron & Steel Works v. Goerig*..... 149

WRITS:

See MANDAMUS.

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